Supreme Court, U.S.
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In The

Supreme Court of the United States

ALFRED VILLADSEN,
DONALD AND MARILYN VILLADSEN,
AND JACK MICKEVICH,

Petitioners,

vs.

MASON COUNTY ROAD COMMISSION,
SHERMAN TOWNSHIP, DEPARTMENT OF
NATURAL RESOURCES, AND MASON
COUNTY DRAIN COMMISSIONER,

Respondents.

On Petition For Writ Of Certiorari
To The Michigan Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the State of Michigan, through its political subdivision the Mason County Road Commission, violate the notice requirement of the due process clause of the Fifth and Fourteenth Amendments to the United States Constitution by acquiring property rights from Petitioners via implied dedication when notice was not given to Petitioners but instead to third parties?

PARTIES TO THE PROCEEDINGS

Petitioners, who were plaintiffs below, are **Alfred Villadsen, Donald** and **Marilyn Villadsen**, and **Jack Mickevich**.

Respondents, who were defendants below, are **Mason County Road Commission, Sherman Township, Department of Natural Resources**, and **Mason County Drain Commissioner**.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

None of the Petitioners is a corporation as contemplated in Rule 29.6.

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CITATIONS OF REPORTS OF OPINIONS ENTERED IN THE CASE

The decisions of the Michigan Supreme Court of which review is sought is *Villadsen v. Mason County Rd. Comm'n*, 477 Mich. 918, ___ N.W.2d ___ (2006) and reproduced in the Appendix at App. 75, that being the order denying reconsideration.

The denial of application for leave to appeal by the Michigan Supreme Court is reported at *Villadsen v. Mason County Rd. Comm'n,* 475 Mich. 857, ___ N.W.2d ___ (2006) and is reproduced in the Appendix at App. 1.

The Michigan Court of Appeals order denying rehearing is unpublished and reproduced in the Appendix at App. 21.

The Opinion of the Michigan Court of Appeals is reported at *Villadsen v. Mason County Rd. Comm'n,* 286 Mich. App. 287, 706 N.W.2d 897 (2005) and reproduced in the Appendix at App. 3.

The decision of the Mason County Circuit Court dated October 21, 2003 is unpublished and reproduced in the Appendix at App. 22.

BASIS FOR SUPREME COURT JURISDICTION

The order denying reconsideration by the Michigan Supreme Court was entered October 31, 2006. (App. 75). The Michigan Supreme Court entered its Order on May 19, 2006. (App. 1). The Court has jurisdiction under 28 U.S.C. § 1254(1) to review on a writ of certiorari the Order of the Michigan Supreme Court.

The present petition is timely filed under 28 U.S.C. § 2101(c) and under Rule 13.1 of this Court.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment V, Due Process Clause.

Constitution of the United States, Amendment XIV, Due Process Clause.

STATEMENT OF THE CASE

This case involves the taking of property owned by Petitioners and their predecessors by the Mason County Road Commission, a political subdivision of the State of Michigan, without condemnation or express grant, but by an implied dedication as determined by the Michigan Supreme Court. Petitioner Alfred Villadsen's great uncle, James Freeman, owned the North half of a portion of the property in question, having purchased the same in 1910. Thereafter, Petitioner Marilyn Villadsen lived on the property from 1931, when she was a small child, until 1977 when the property was sold. Ms. Villadsen returned to the vicinity and moved to property contiguous to the original property in 1990. Alfred Villadsen purchased a contiguous property in 1988 and repurchased the subject property in 1997, he has also purchased a number of surrounding parcels. Alfred Villadsen sought to develop and maintain his property, but the Mason County Road Commission asserted that a portion of the property was a public highway. This portion of property will hereinafter

be referred to as the "disputed parcel." Petitioners sought confirmation that the disputed parcel was not a road from the Mason County Road Commission who declined to acknowledge that the disputed strip was not a road and denied Petitioner's request though Mason County has designated the disputed parcel as a trail, not a road, on official county maps. (App. 55-56). The Mason County Road Commission brought a bulldozer onto the disputed parcel in 2002 to enhance the trail immediately after denying confirmation that the property was not a road. (App. 51). This was probably the first time ever and certainly the first time since at least prior to the 1930's, that any public road authority had entered onto the disputed parcel to do work. (App. 69 & 72).

Petitioner Jack Mickevich joined Mr. Villadsen in objecting to the assertion that there was a road running through his property and agreed to the initiation of suit. Petitioners filed an action to quiet title to the disputed parcel immediately after the Mason County Road Commission dispatched the bulldozer to perform work on the disputed parcel. The Mason County Road Commission subsequently filed a counterclaim asserting that the disputed parcel was a road. The Mason County Road Commission initially argued that the disputed parcel was a road under the highway-by-user statute or by dedication and acceptance, with the road being transferred to the County under a historical Michigan statute.[1] (App. 72-73).

[1] Throughout applicable Michigan history, there have been two ways that the government can take private property for use as a road other than through condemnation. The first is dedication by the landowner and acceptance by the government and the second is highway-by-user. In the 1930's, roads however established were transferred from control by local governments to control by counties

(Continued on following page)

The Mason County Road Commission apparently wants to keep the disputed parcel on the books as part of the "road bank" based upon a potential future need. (App. 59). The position of the Mason County Road Commission is a little disingenuous because the disputed parcel is not used by vehicles, but is used as a source of Michigan and Federal highway money whether it is used as a public thoroughfare or not. (App. 66). The Mason County Road Commission originally argued that because Petitioner's predecessor in title had tendered a grant of right-of-way to a small portion of the disputed parcel in 1915, there was dedication and acceptance. However, there was no evidence that all of the property on the North half or any of the property on the South half of the disputed right-of-way was ever dedicated and there was no evidence that the disputed parcel was ever accepted by the predecessor to the Mason County Road Commission, Sherman Township, and the theory was abandoned at trial. (App. 73). The second theory, that of highway-by-user, was established by the Michigan Legislature in a statutory scheme in Mich. Comp. Laws § 221.20 (App. 77) and establishes a procedure for implied dedication of a highway by a landowner. Implied dedication of a highway occurs where the government establishes four elements within a delineated ten-year period. The four elements are that the parcel must

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through the McNitt Act, that being Consolidation of Township and County Road Systems, Act 130 of 1931. If a road was not established as a road prior to the McNitt Act and transferred to county control pursuant to the statutory scheme set forth in the McNitt Act in the 1930's, then the road must be created via dedication and acceptance or pursuant the statutory scheme required for highway-by-user. In other words, Michigan created a finite inventory of roads then in existence through the McNitt Act and roads could thereafter be added or created through dedication and acceptance or highway-by-user.

have a clearly identifiable or defined line of travel; it must be used and worked on by the local public authority; it must be used by the public for ten consecutive years; and the use must be open, obvious and hostile to the interests of the property owner. The statutory scheme set forth by the State of Michigan as implemented by the state courts is important because the government is taking significant property rights from private individuals. Substantial notice would presumably be required for this taking.

The trial court found that the Mason County Road Commission established that the disputed parcel was a road through implied dedication pursuant to the operation of Mich. Comp. Laws § 221.20 and declared that all of the elements of a highway-by-user were met. (App. 32-50). The trial court, however, did not delineate in what consecutive ten-year period it was relying upon despite requests from both Plaintiffs' and Defense counsel to do so. (App. 78-81). The trial court judge instead indicated that at some point over a nearly one hundred-year period the elements had been satisfied. (App. 50). The highway-by-user statute, Mich. Comp. Laws § 221.20, and Michigan case law require that the elements exist in a finite ten-year period and by implication that there be notice to the landowner of the taking. *Kentwood v. Sommerdyke Estate*, 458 Mich. 642, 581 N.W.2d 670 (1998), *Houthoofd v. Tuscola County Rd. Comm'n*, 2006 WL 21434932 (E.D. Mich., June 18, 2003). The trial court relied on the fact that work done on parts of the existing Darr Road, not on the disputed parcel or even arguably contiguous to it, met the requirement that the road be worked on by public authorities thus giving Petitioners notice. The trial court also found that there had been public use though it acknowledged that the disputed parcel has not been reasonably passable since the

1980's. (App. 42). Prior to the 1980's there was virtually no traffic other than a rare four-wheel drive vehicle and heavy farm equipment. (App. 68, 70-71). Other than use by owners, invitees, and neighbors, including Mr. Stanley Saya who used it as a short cut to move heavy farm equipment, there is nothing in the record to suggest that the disputed parcel was needed or ever used by anyone for purposeful travel. (App. 57-59 & 63-64). Petitioners acknowledge that there were extremely rare instance of members of the public being on the disputed parcel such as random sightseers and the occasional person on horse-back. (App. 60-62). The trial court's refusal to delineate the ten-year period it was relying on in making its decision, little to no public use, and its reliance on work done outside the disputed parcel bolster Petitioners' position that this was a taking without due process and unprecedented. Petitioners were left to speculate when the taking occurred and what action by Mason County Road Commission or its predecessor occurred that would have put them on notice that property rights were being taken by the government.[2] Petitioners filed their appeal to the Michigan Court of Appeals seeking review of the trial court's decision.

On appeal, the Michigan Court of Appeals, in its opinion, agreed that a specific ten-year period needed to be defined pursuant to the statute. (App. 17). The Court of Appeals pointed to a twenty (20) year period, that being 1977 to 1997, and held that during this time all of the elements existed. (App. 18). The facts of the case and

[2] The ten-year period is significant not only because that is when the road was purportedly established, but also to give the affected landowner the opportunity to rebut the presumption that the road is four rods in width. Mich. Comp. Laws § 221.20.

record below did not support the Court of Appeals decision. There is nothing in the trial court record to indicate that there was any work on the disputed parcel during the period of time pointed to by the Court of Appeals[3] or that the users of the disputed parcel were of the general public and not owners or invitees. The Court of Appeals found that work done on parts of the existing Darr Road, which are well outside the disputed parcel, would be sufficient to put the landowner on notice that the Mason County Road Commission was taking the disputed parcel for highway purposes. (App. 11-12). This decision ignored the requirement that a ten-year period be delineated during which all of the elements existed concurrently to give the affected property owner notice. Petitioner filed a timely motion for reconsideration, which was denied. (App. 21).

Petitioner applied for leave to appeal to the Michigan Supreme Court. A divided court denied leave by an Order dated May 19, 2006. (App. 1-2). In its Order denying leave, the Michigan Supreme Court indicated that it affirmed the decision of the Court of Appeals but for different reasons. The Michigan Supreme Court essentially vacated the Court of Appeal decision but affirmed the outcome because the Court asserted that the disputed parcel was part of the existing Darr Road in the 1930's. The Michigan Supreme Court stated that there was "no dispute that the road existed by then" a "fact" that lacks a scintilla of support in the record and ignores the fundamental question of when

[3] The Mason County Road Commission asserts that an employee traveled a portion of the disputed parcel once per year from 1967 to 1987. While Petitioners never saw him, they assume that representation was accurate. However, no steps were taken to make the road reasonably passable during the twenty-year period found by the Michigan Court of Appeals.

the property owner lost their property rights. *Villadsen v. Mason County Rd. Comm'n*, 475 Mich. 857, ___ N.W.2d ___ (2006), Appendix at App. 1. Contrary to the "finding" of the Michigan Supreme Court, a witness at trial, Marilyn Villadsen, clearly stated that she lived on the property from 1931 until 1977 and again from 1990 to the present and that the disputed parcel was not a road, not worked on by the government and not used by the public. (App. 67-72). The Michigan Supreme Court essentially did the same thing that the Michigan Court of Appeals and the trial court did, it found a way to circumvent the ten-year requirement that gives the affected property owner appropriate notice of the taking. The Michigan courts have essentially found that it is necessary for the State to give notice of the taking, but the State may notify the landowner after the fact that land has been taken. Petitioner then filed a timely motion for reconsideration, which was denied. (App. 75). Petitioner now seeks review of this matter by the United States Supreme Court through its submission of this Petition for Certiorari.

As will be discussed in length below, Petitioners acknowledge that states have the power to restrict or abrogate property rights via statutory schemes. They can only do so, however, if the scheme provides for sufficient notice to the landowner giving the landowner an opportunity to object to the taking. Absent such notice, any taking by the state – whether pursuant to statutory authority or otherwise – violates the due process protection of the Fifth and Fourteenth Amendments. See *Texaco, Inc. v. Short*, 454 U.S. 516 (1982) and *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

REASONS FOR GRANTING THE WRIT

I. THE STATE OF MICHIGAN, THROUGH ITS SUBDIVISION THE MASON COUNTY ROAD COMMISSION, VIOLATED THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY WIELDING STATE AUTHORITY TO DEPRIVE A CITIZEN OF CONTROL AND USE OF HIS PROPERTY FOR PUBLIC USE WITHOUT ANY ACTION BY THE STATE REASONABLY CALCULATED TO PROVIDE NOTICE TO PETITIONERS OF THE TAKING.

This case strikes at the very heart of the Fifth and Fourteenth Amendments of the United States Constitution and asks: what process is due and what notice is required from the State, or its subdivision, to a private citizen when the State is taking property or property rights of that citizen? Is it allowable for a subdivision of the state wielding state authority to deprive a citizen of control and use of his property in favor of the public use without any action by the state reasonably calculated to provide notice to the affected property owner? The question in this instance, however, is not in relation to condemnation or the acquisition of property through eminent domain as in *Kelo v. City of New London*, 545 U.S. 469 (2005) where property is taken for public use with reasonable compensation. The property to be taken in this instance is a strip of land which bifurcates the property of Petitioner and which is sought for possible future transportation needs of the County and to continue receipt of State and Federal highway monies. (App. 66). The taking of land for highway use is clearly possible under various theories and has not been considered by this Court since *Rindge Co. v. Los Angeles County*, 262 U.S. 700 (1923). In every case where

this Court has allowed a taking, whether by compensation or otherwise, there has been reasonable notice to the affected landowner where the landowner has an opportunity to object.

This case, however, does not question whether or not private property MAY be taken by a local authority, but the manner in which it may be done. The Legislature in Michigan has addressed the question of how a road becomes a road in the state and has, at various times in history, provided avenues for the public taking of land for highway use. Please see footnote 1. Presently there are two methods through which land may be taken for use as a highway in Michigan in addition to condemnation. The first is through dedication and acceptance whereby an individual landowner conveys an interest in their private property to the local road authority and the local road authority in turn accepts it by making improvements upon it. The second way private property becomes a public road is by operation of Mich. Comp. Laws § 221.20, which is commonly referred to as the highway-by-user statute and is an implied dedication of the property for highway use. For a methodology of taking, such as Michigan highway-by-user concept, constitutional scrutiny requires reasonable notice to the affected landowner.

The Due Process Clause of the Fourteenth Amendment requires that notice be given before a legal taking can occur. *Texaco, Inc. v. Short*, 454 U.S. 516 (1982). Implied notice that land will be taken pursuant to a statutory scheme can be acceptable under *Texaco*, but a landowner must be adequately notified of that taking and the notice must be reasonably calculated to inform the landowner his land will be taken. *Walker v. City of Hutchinson*, 352 U.S. 112 (1956), see also *Mullane v. Central*

Hanover Tr. Co., 339 U.S. 306 (1950), *Covey v. Town of Somers*, 351 U.S. 141 (1956). These procedural safeguards are, in modern times, often codified in statutes that provide strict guidelines that must be followed before private land can be deemed to be public or used for public purposes. In Michigan, the legislature had codified the manner in which private property may be claimed for use as a public highway. The statute, Mich. Comp. Laws § 221.20, as applied historically, required that the State establish four elements before it can take private land for public highway use. The elements are necessary to both establish that there has been public use and maintenance and to provide notice to landowners that they will lose their property if they do not take steps to prevent the taking. Pursuant to the statute, the four elements the State must prove are: 1) that there is a defined line of travel; 2) that the road has been used and worked upon by public authorities; 3) that there has been ten years of continuous use of the road by the general public; and 4) that the use by the public has been open, obvious and hostile to the use of the landowner. See *Kentwood,* 458 Mich. 642, 581 N.W.2d 670.

Even where there is a statutory scheme in place, the State must still comply with the requirements of this scheme before taking the property giving the affected party notice or the State risks violating the Fourteenth Amendment. In the present case, as in *Texaco*, landowners are subject to losing the right to their property if they fail to act to stop the taking within a specific timeframe. In the instant case, the requirement is that the landowner must act within the applicable statutory ten years during which the road is being taken by the State through the convergence of the elements of highway-by-user. The landowner's

inactivity during this time works to allow the State to take the land and further to do so to the standard width of sixteen rods or sixty-six feet. See *Kentwood,* 458 Mich. 642, 581 N.W.2d 670. The State must rely on the statutory scheme as interpreted by the Michigan courts to determine whether or not the disputed parcel is a road, which requires the State to establish that all elements were met during a consecutive ten-year period. *Kentwood,* 458 Mich. 642, 581 N.W.2d 670. What is relevant to this appeal and fundamentally might give notice to the landowner that his land will be taken is that the government is asserting dominion and control over the land through work completed by a public authority, that being the Mason County Road Commission, coupled with public use creating a presumption of implied dedication. If implied dedication is to occur, it is of paramount importance that the landowner be given notice of the taking by the government exercising sufficient dominion and control over the property by maintenance or other use. In this case, the Michigan Supreme Court abandons the requirement of *Kentwood* that the landowner must be given notice through the State exercising dominion and control over the property and instead allows the State to take property for highway purposes without any notice to the landowner until after the taking.

The issue presented in this matter is of tantamount importance to the landowners of the State of Michigan as the decision of the Michigan Supreme Court allows local road commissions, and presumably other public bodies, to take private property without compensation and without any acts calculated to give reasonable notice to the affected landowner. In the instant case, the Mason County Road Commission acknowledged that the disputed parcel

was not part of the public highway system though actual dedication and acceptance. (App. 73). No evidence was presented at trial indicating that it was accepted by the State pursuant to the McNitt Act in the 1930's. (App. 72-73 and footnote 1). The State was never able to identify and the lower courts were not able to extrapolate from the record a ten-year period where action by the Mason County Road Commission or its predecessor was reasonably calculated to give Petitioners or their predecessors notice of the taking. Historically, notice was sufficient where a public authority exercised dominion and control over the property by working on it and keeping it open to the public, this allows the affected landowner notice that the government will take his right to his property and permits the landowner to act. It is not enough for a governmental official to travel the road annually, there must be actual work completed. *Maghielse v. Crawford County Road Comm'n*, 47 Mich. App. 96, 209 N.W.2d 330 (1973). The Michigan Supreme Court ignored the requirement that the affected landowner have notice of the taking and it ignored the requirement that some act of either the governmental entity taking the property or the landowner be completed for an affected landowner to lose his right to ownership of his property.

At trial, the Mason County Road Commission acknowledged that the only theory upon which they could proceed was through the application of the highway-by-user statute. (App. 73). The trial court found in their favor, but failed to determine a ten-year period sufficient under the statute to provide for the taking. The Court of Appeals affirmed the lower court's decision and found that the elements existed at some point over a specified twenty-year period, apparently finding notice to Petitioners by the

State working on a section of the existing, passable road contiguous to the disputed parcel. (App. 3). The Michigan Supreme Court, presumably realizing that there was not a scintilla of evidence in the record to support the Court of Appeals determination, did not find that there was any consecutive ten-year period during which time all of the elements were present but rather did an end run around the statute and found that the disputed parcel was a road by the 1930's without addressing any method of creation. *Villadsen v. Mason County Rd. Comm.*, 475 Mich. 857 ___ N.W.2d ___ (2006), (App. 1). The theory accepted by the Michigan Supreme Court would provide that there is another way for roads to come into existence in Michigan without the need of due process or formal acceptance, but rather simply from the thrust of its interpretation of the history of the alleged strip. The Michigan Supreme Court allowed the taking without any identified procedure or even addressing notice to Petitioners herein or their predecessors. Allowing a taking in the manner promulgated by the Michigan Supreme Court will impermissibly allow the State of Michigan to take private property without affording the landowner his or her constitutionally required notice. The propriety of the Michigan Supreme Court's decision is a question that must be addressed and decided by this Court. Essentially, through judicial action, the Michigan Supreme Court has nullified the requirement that property owners have the right to notice before their property is taken by the State.

II. MICHIGAN COURTS HAVE VIOLATED THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY DETERMINING THAT THE STATE HAS NO REQUIREMENT TO PROVIDE DIRECT NOTICE OF A TAKING TO THE AFFECTED LANDOWNER AND INSTEAD THAT NOTICE CAN BE INFERRED IF IT IS GIVEN TO A THIRD-PARTY LANDOWNER WHOSE PROPERTY IS CONTIGUOUS TO THAT OF THE AFFECTED LANDOWNER.

To take a landowners property, that landowner must be adequately notified that the State will be taking his land and that notice must be reasonably calculated to inform the landowner that his land will be taken. *Walker,* 352 U.S. 112, see also *Mullane*, 339 U.S. 306, and *Covey*, 351 U.S. 141. Michigan has established a legislative framework that sets forth how a parcel of property can be taken by the government for a public road without formal dedication or condemnation, Mich. Comp. Laws § 221.20. (App. 77). That statute, as historically applied, required that four elements be met during a consecutive ten-year period. *Kentwood,* 458 Mich. 642, 581 N.W.2d 670. The record below reveals that these four elements did not exist during any delineated ten-year period. The Michigan Supreme Court simply states that the disputed parcel was a road by the 1930's without further explanation of how it became a road or what evidence the Court relied upon to reach this decision. *Villadsen v. Mason County Rd. Comm.*, 475 Mich. 857, ___ N.W.2d ___ (2006), (App. 1).

For the record to support the decisions below, the only way that all four elements could have existed in any particular ten-year period is if the state courts allowed: 1) a defined line, 2) public work done on property outside the

disputed parcel and owned by third-parties, 3) random and permissive public use, and 4) that open, obvious and notorious means random use by sightseers, people on horseback and snowmobilers, to meet the requirements. In finding that the disputed parcel was a road, the Michigan Courts have determined that notice to an affected landowner directly is not required. Instead, notice can be inferred by notice given to a third-party property owner whose property may or may not be contiguous to that of the affected landowner.

The Michigan Supreme Court has held since 1885 that work done on sections of a parcel of property to be taken as a road is sufficient to provide notice that the whole road, including portions of the road not worked on, could be taken for public use. *Nye v. Clark*, 55 Mich. 599 (1885). However, in *Nye* and its prodigy, the Court clearly indicated that the work on other sections of road made the road *as a whole* reasonably passable, including the disputed section. The trial court in the instant case acknowledged that the disputed parcel in this case as a whole is not reasonably passable. (App. 30). The Michigan courts are violating the notice requirement of the Fifth and Fourteenth Amendments by allowing work completed on contiguous property owned by disinterested third-parties to constitute sufficient notice that their property will be taken for use as a road. It is absurd to suggest that when a parcel of property is not passable as a road, and never has been, is a road because work has been completed on other, passable contiguous property provides notice that the land will be taken.

For a highway-by-user to be created in Michigan, historically, the road must be used and worked on by public authorities evidencing State acceptance of the

implied dedication of the road. This element required that the public authority evidence its control over the proposed highway by expending public monies and resources to keep the road in a reasonably passable condition.[4] Infrequent and minor maintenance will not make a public highway of a private road.[5] Work by public authorities presumably gives the landowner notice, during the ten-year statutory period, of the county's intention to acquire the land by user. What the Michigan Supreme Court is now saying is that it is not necessary for the State to work on a parcel of property that is virtually impassable, but notice is sufficient if the State works on a contiguous, passable parcel.

The Michigan Courts have historically relied on *Pulleyblank, Indian Club,* and *Kalkaska County Bd. of County Rd. Comm'rs v. Nolan*, 249 Mich. App. 399, 643 N.W.2d 276 (2001) in drawing the conclusion that work done on a portion of a proposed highway was sufficient to

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[4] *See Alton v. Meeuwenberg,* 108 Mich. 629, 636, 66 N.W. 571 (1896); *Neal v. Gilmore,* 141 Mich. 519, 526-527 (1905); *Boone v. Antrim County Board of Rd. Comm'rs,* 177 Mich. App. 688, 694, 442 N.W.2d 725 (1989); see also *Indian Club v. Lake County Rd. Comm'rs,* 370 Mich. 87, 91, 120 N.W.2d 823 (1963); *Pulleyblank v. Mason County Rd. Comm.,* 350 Mich. 223, 86 N.W.2d 309 (1957); *Missaukee Lakes Land Co. v. Missaukee County Rd. Comm.,* 333 Mich. 372, 378, 53 N.W.2d 297 (1952); *Cimock v. Conklin,* 233 Mich. App. 79, 84, 592 N.W.2d 401 (1998).

[5] *Maghielse v. Crawford County Rd. Comm.,* 47 Mich. App. 96, 98-99, 209 N.W.2d 330 (1973) citing *Stickley v. Sodus Twp.,* 131 Mich. 510, 91 N.W. 745 (1902); *Missaukee Lakes Land Co. v. Missaukee Rd. Comm.,* 333 Mich. 372, 53 N.W.2d 297 (1952); *Smith v. Auditor General,* 380 Mich. 94, 155 N.W.2d 822 (1968); *Cotton v. Castleton Twp.,* 31 Mich. App. 620, 188 N.W.2d 39 (1971); *Village of Bellaire v. Pankop,* 37 Mich. App. 50, 194 N.W.2d 379 (1971).

indicate acceptance of the entire road by public authorities. The above cases do make that assertion. They all, however, base this assertion on two Michigan Supreme Court cases, *Nye v. Clark*, 55 Mich. 599 (1885) and *Neal v. Gilmore*, 141 Mich. 519 (1905). Both *Nye* and *Neal* assert that it is not necessary that all sections of a road be worked on to evidence the public authority's acceptance of the road when the parts not worked on were *not in need of work*. *Id.* That is, the work done by the public authorities was all that was necessary to make the entire road reasonably passable. In *Neal*, the court states that:

> [t]he evidence is undisputed that no work was done upon the 80-rod strip between the fences, which was obstructed by the cross-fences torn down by defendants; but it is also substantially undisputed that this 80 rods was a reasonably good highway, which did not need to be worked. It is not essential that every part of a highway should be worked in order to evidence the intention of the public authorities to accept and maintain the entire highway. The jury might properly find, under the evidence in this case, that the portions worked were so worked for use in connection with the 80 rods not worked. *Id.* at 526-527.

In *Nye*, the Court states that:

> [t]here is testimony that the land did not require much working to make it suitable for passage, and the fact that brush was allowed to grow upon so much as was not in the actual roadway, could not destroy the public rights in the highway or any part of it. It must rest largely with the authorities to what extent they will clear out the space within the highway lines, and a road not much frequented would not warrant any great

> expenditure beyond what would make it passable. *Id.* at 602.

In this case, the disputed parcel is not, and has not been, reasonably passable and the trial court so found. (App. 30). If the Road Commission actually intended to accept this parcel as a road and maintain it as other roads in its charge, it would have used its resources to improve the whole parcel or at least the worst of the wetland areas to make the entire disputed parcel passable. If the Mason County Road Commission or its predecessor made the disputed parcel reasonably passable, it would have presumably provided Petitioners with adequate notice that the State intended to take the disputed parcel for public use as a highway. The Mason County Road Commission's failure to ever address these maintenance needs and make the disputed parcel reasonably passable preclude application of the *Nye* and *Neal* analysis, which arguably would not comport with the notice requirements of the Fourteenth Amendment. Allowing Michigan courts to continue to accept notice that is not reasonably calculated to inform the landowner that his land is to be taken by the government for public use violates the Due Process Clause of the Fourteenth Amendment, which requires that notice be given before a taking can occur. *Texaco*, 454 U.S. 516. Implied notice that land will be taken pursuant to a statutory scheme is acceptable if reasonably calculated to give the affected property owner notice. *Id.* However, "in states bound together by a Constitution and subject to the Fourteenth Amendment, great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact." *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 320 (1950), citing *McDonald v. Mabee*, 243 U.S. 90, 91 (1917). That is exactly what we have here, fictional notice to a landowner that his land

was to be taken for use as a road simply so that the "road" will be on the "book" and the County will receive additional highway funding from the State and Federal governments, which deprives Petitioners of the right to their property. The Michigan Supreme Court gave no indication as to why it held that the road was established as a road by the 1930s. *Villadsen*, 475 Mich. 857. (App. 1). The Michigan Court of Appeals found that it was a road because all elements of a Michigan statute were met, but the record does not support that finding and that portion of the decision of the Court of Appeals was vacated by the Michigan Supreme Court. (App. 2). Legislative schemes are created and applied to provide courts with a roadmap to follow in making judicial decisions and courts have an obligation to avoid judicial legislation. *U.S. v. National Treasury Employees Union*, 513 U.S. 454, 479 (1995). Allowing a taking in the manner adopted by the Michigan Supreme Court will set an untenable precedent and lead to continued judicial expansion of the protections in place for Michigan landowners and will result in more takings without notice. If the decision of the Michigan Supreme Court is upheld, the courts can make a determination that the State owns land without any act by the State to give the affected property owner notice of the taking. Ownership of land is one of the greatest rights that we, as citizens of the United States, have and the State of Michigan has summarily removed Petitioners ownership without due process and without regard for the supreme law of the land.

III. IN AFFIRMING A TAKING, A STATE COURT OF LAST RESORT MAY NOT CREATE A NEW PROCESS WHEREBY NO NOTICE TO THE LANDOWNER AND NO PROOFS IN THE RECORD BELOW SUPPORT ITS ACTION.

The Michigan Supreme Court in its Order affirming the Court of Appeals decision indicated that "[t]he evidence shows that the strip of land at issue was, and is, one portion of a road that was an established public road by the 1930s. There is no dispute that the road had long existed by then." (App. 2). The Order goes on to state that "[t]he parties and the lower courts were unnecessarily concerned with evidence regarding use and maintenance of the road *after* the time when it is clear a public road had already been established." While it is true that Darr Road exists intermittently throughout the County (App. 22), it is irrelevant to the disputed parcel. The opinion fails to indicate how the disputed parcel became a road in the first place. In reviewing the Order, it is apparent that the Michigan Supreme Court would propose a new process for a strip of private property to become a public highway and that all that would be necessary would be a desire for the State to have ownership of the property and any historical evidence tending to show that the State may have some claim to the property.

The Order of the Michigan Supreme Court appears to assert that in order for the disputed parcel to be considered a public highway by the 1930's all that was required was a showing of: a defined line as evidenced by the aerial photograph taken in 1938 coupled with the fact that the proposed road adhered fairly closely to a straight section line and a deed from 1915 which dedicated one-half the width and one-fourth the length of the disputed strip for

"highway purposes." It would appear that the Michigan Supreme Court has promulgated a hybrid between express dedication, the deed which was never accepted, and implied dedication without use, repair or that the disputed parcel be reasonably passable. What has been omitted is any element that would be reasonably calculated to give affected landowners notice of the taking of their land for highway use. What has also been omitted is an adherence, or even a mention, of any of the previously litigated or legislated avenues for the taking of private land for public use. The Michigan Supreme Court has impermissibly adopted a new manner in which land may be taken from the citizens of the State of Michigan without the citizen having any notice or opportunity to be heard, which violates the due process protections of the Fifth and Fourteenth Amendments. The law of the land in Michigan is now that that State simply needs to find a way to lay claim to some small part of the land to be taken, offer some historical evidence that the State might have some slight claim to the property and then ask the court to endorse it.

CONCLUSION

The Fifth and Fourteenth Amendments of the United States Constitution provide the citizens of our country with certain securities. One of those securities is that private property is to be protected from encroachment by the government except where it is absolutely necessary and certain safeguards are in place before it can be taken. These safeguards necessarily include that a landowner must be given adequate notice of the intended taking. In this case, approximately one mile of land has

been converted from its rightful landowners without notice, need or benefit to the public. This case deprived Petitioners of their land, but it also sets a dangerous precedent. If Michigan believes that your land should be a road, they may simply say it was a road without any proof and so it will be. The obligation of the courts is to uphold the law, not read into the record facts that clearly do not exist. Petitioners respectfully request that this Honorable Court grant this Petition for Writ of Certiorari and prevent the further taking of the private property of the citizens of the State of Michigan without adhering to a scheme and that precludes notice as required by the Fifth and Fourteenth Amendments to the United States Constitution.

Respectfully submitted,

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Order

May 19, 2006

129672

Michigan Supreme Court
Lansing, Michigan

Clifford W. Taylor,
Chief Justice

Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman,
Justices

ALFRED VILLADSEN, DONALD VILLADSEN, MARILYN VILLADSEN, and JACK MICKEVICH,
Plaintiffs/Third-Party Defendants-Appellants,

v

MASON COUNTY ROAD COMMISSION,
Defendant/Third-Party Plaintiff-Appellee,

and

SHERMAN TOWNSHIP,
Defendant/Third-Party Plaintiff,

and

DEPARTMENT OF NATURAL RESOURCES AND MASON COUNTY DRAIN COMMISSIONER,
Third-Party Defendants. /

SC: 129672
COA: 255955
Mason CC: 02-000348-CH

On order of the Court, the application for leave to appeal the July 19, 2005 judgment of the Court of Appeals is considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we AFFIRM the decisions of the Court of Appeals and the Mason Circuit Court but do so for reasons other than those stated by the Court of Appeals. The evidence shows that the strip of land at issue was, and is, one portion of a road that was an established public road by the 1930s. There is no dispute that the road had long existed by then. There is evidence of township ownership as early as the early 1900s. The road runs in a fairly straight fashion for approximately 20 miles, and runs along a section line for the approximately one mile that it traverses or crosses plaintiffs' properties. An aerial photograph from the 1930s shows the course of the road, and there is evidence of a 1915 deed conveying to the township, "for highway purposes," approximately one-half of the strip of road presently in dispute. The parties and the lower courts were unnecessarily concerned with evidence regarding use and maintenance of the road *after* the time when it is clear a public road had already been established. The highway-by-user statute, MCL 221.20, allows public highways to be *established* under a theory of implied dedication. *City of Kentwood v Sommerdyke Estate*, 458 Mich 642, 650-656 (1998). The evidence pertaining to the use and partial disrepair of the road after the public road was established was irrelevant to whether a highway by user was established.

CAVANAGH and KELLY, JJ., would grant leave to appeal.

STATE OF MICHIGAN

COURT OF APPEALS

ALFRED VILLADSEN, DONALD VILLADSEN, MARILYN VILLADSEN, and JACK MICKEVICH,	UNPUBLISHED July 19, 2005 APPROVED FOR PUBLICATION
Plaintiffs/Third-Party Defendants-Appellants,	September 27, 2005 9:10 a.m.
v	No. 255955 Mason Circuit Court LC No. 02-000348-CH
MASON COUNTY ROAD COMMISSION,	
Defendant/Third-Party Plaintiff-Appellee,	
and	
SHERMAN TOWNSHIP,	
Defendant/Third-Party Defendant,	
and	Official Reported Version
DEPARTMENT OF NATURAL RESOURCES AND MASON COUNTY DRAIN COMMISSIONER,	
Third-Party Defendants.	

Before: O'Connell, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

Plaintiffs appeal as of right an order in which the trial court held that a particular section of Darr Road that is located in Sherman Township in Mason County and that

abuts plaintiffs' property is a highway by user under MCL 221.20. We affirm.

At issue in this case is ownership of a one-mile section of Darr Road. Darr Road is a north-south road that the trial court characterized as "an established but intermittent section line road [that extends] for 19 or 20" miles. The disputed portion of the road lies between Fountain Road and Mavis Road, which are both east-west roads, and it begins one-quarter mile south of Fountain Road and ends one-quarter mile north of Mavis Road. The one-quarter mile section of Darr Road located south of Fountain Road and extending to the beginning of the disputed portion of the road is an improved county road. The Lincoln River bridge is located on this one-quarter mile section of the road. Plaintiffs do not contend that this one-quarter mile section of Darr Road or the one-quarter mile section immediately north of Mavis Road is not a public road. The dispute is limited to the one-mile section described above.

Plaintiff Alfred Villadsen[1] owns approximately 400 acres of land that borders the northern portion of the disputed section of Darr Road to the east. Plaintiff Jack Mickevich owns approximately 80 acres of land that borders the southern portion of the disputed section of Darr Road to the west. While plaintiff Villadsen uses the portion of Darr Road in dispute to gain access to his property, plaintiff Mickevich does not.

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[1] Plaintiffs Donald and Marilyn Villadsen are Alfred Villadsen's parents. They owned Alfred's home and real property from 1931 until 1977. At the time of trial, they lived across from Alfred on the disputed portion of Darr Road.

Although a small portion of Darr Road is paved, most of it is a dirt and gravel road, with the exception of the approximately one-mile section that is the subject of the dispute in this case. The disputed section of the road was described at trial as a two-track road. A Mason County map labels the disputed portion of the road a trail. The disputed portion of Darr Road is not paved and, for the most part, is not covered with gravel. Moreover, it is undisputed that at certain wet times of the year, the portion of the road becomes temporarily impassable because of the existence of the two wet areas. However, over the years, detours have developed around both wet areas. Testimony at trial revealed that for years people have been getting stuck in the wet areas of the disputed portion of the road. One of the wet areas is near plaintiff Alfred Villadsen's property on the northern portion of the road in dispute. The other wet area, which is known as the blueberry bog, is larger and poses greater difficulty for vehicles attempting to pass than the first wet area; the blueberry bog is located more to the south-east section of the disputed portion of the road.

There was testimony that since the 1950s there have been "dead end," "no outlet," or "road closed" signs on or near the disputed portion of Darr Road at different times. Testimony revealed that defendant road commission had placed "road closed" signs on the disputed portion of the road in 2002, and these signs were present at the time of trial. Evidence also established that there were "no outlet" signs on or near the disputed portion of the roadway at the time of trial. However, the record was unclear regarding who had placed the "no outlet" signs or any of the other signs that had been placed on or near the disputed roadway over the years.

On July 30, 2003, plaintiffs filed a complaint seeking to quiet title to the road in question and enjoin defendants from entering the property. Defendants each filed an answer and affirmative defenses, arguing, among other things, that the disputed portion of Darr Road was a public road either under the highway-by-user statute, MCL 221.20, or that the road had been created by dedication and acceptance. In addition, defendant road commission filed a third-party complaint against plaintiffs, Sherman Township, other individuals who owned property near the disputed portion of Darr Road, the Department of Natural Resources, and the Mason County Drain Commissioner, seeking a declaratory judgment that the disputed portion of Darr Road was a public highway, either through dedication and acceptance or under the highway-by-user statute.

The trial court issued an opinion and order finding that defendants established the four elements necessary to conclude that the portion of Darr Road in question was a highway by user under MCL 221.20.[2]

Plaintiffs argue that the trial court erred in holding that the one-mile portion of Darr Road in dispute was a public road under the highway-by-user statute. We disagree.

This Court reviews de novo the legal requirements for establishing a highway by user, but reviews the trial

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[2] The order also addressed defendant's third-party complaint. As it relates to plaintiffs, the order simply effectuated plaintiffs' stipulation on the record that the one-quarter mile sections of Darr Road just south of Fountain Road and just north of Mavis Road were public roads under the highway-by-user statute. Plaintiffs do not appeal this portion of the order.

court's factual findings for clear error. *Kalkaska Co Bd of Co Rd Comm'rs v Nolan*, 249 Mich App 399, 401; 643 NW2d 276 (2002). A finding is clearly erroneous if the reviewing court is left with the definite and firm conviction that a mistake has been made. *Id.*

The highway-by-user statute, MCL 221.20, provides:

> All highways regularly established in pursuance of existing laws, all roads that shall have been used as such for 10 years or more, whether any record or other proof exists that they were ever established as highways or not, and all roads which have been or which may hereafter be laid out and not recorded, and which shall have been used 8 years or more, shall be deemed public highways, subject to be altered or discontinued according to the provisions of this act. All highways that are or that may become such by time and use, shall be 4 rods in width, and where they are situated on section or quarter section lines, such lines shall be the center of such roads, and the land belonging to such roads shall be 2 rods in width on each side of such lines.

The highway-by-user statute treats property subject to it as impliedly dedicated to the state for public use. *Kalkaska Co, supra* at 401. "'Highway by user' is a term that is used to describe how the public may acquire title to a highway by a sort of prescription where no formal dedication has ever been made." *Kent Co Rd Comm v Hunting,* 170 Mich App 222, 230; 428 NW2d 353 (1988). Establishing a public highway pursuant to the highway-by-user statute requires four elements: (1) a defined line, (2) that the road was used and worked on by public authorities, (3) public travel and use for ten consecutive years without interruption, and (4) open, notorious, and

exclusive public use. *Kalkaska Co, supra* at 401-402. The burden of proof rests with the governmental agency claiming a highway by user. *Cimock v Conklin,* 233 Mich App 79, 87 n 2; 592 NW2d 401 (1998). If all four elements are established, MCL 221.20 raises a rebuttable presumption that the road is four rods, or 66 feet, wide. *Kent Co, supra* at 231.

Regarding the first element, plaintiffs contend that the existence of the two wet areas on the disputed portion of Darr Road preclude a finding that there was a defined line because the existence of the wet areas requires persons traversing the road to take detours that extend outside the right-of-way. In addition, plaintiffs contend that roads that change with the elements do not have a defined line. The trial judge noted in his opinion that he personally visited and observed the disputed portion of Darr Road on September 8, 2003. According to the trial judge's opinion, based on his personal observation, the disputed portion of the road "visually appears to run in a true and straight north/south line across Plaintiff's farm property and in a true straight line south through the wetland area and it continues as a straight line through the woods, across the blueberry bog area, all the way to Mavis Road." The trial court specifically stated that "the roadbed in the wetland was distinctly visible." In addition, the trial court characterized any "meandering" of the road as being "minimal" and not exceeding "four or five feet in direction." Regarding the detours around the wet areas, the trial court observed that, although there was a two-track bypass around the smaller wet area that carried "virtually all of the present traffic," the detour was a "trail of convenience" that "does not negate the fact that the roadbed is easily visible and available for use during dry

periods." In addition to his personal observations of the area in dispute, the trial judge also relied on aerial photographs that were submitted as exhibits in concluding that the section of the roadway in dispute was defined despite the existence of bypasses around the wet areas.

In order to satisfy the defined line element of a highway by user, there must be "a defined line of travel with definite boundaries. . . . " *Rigoni v Michigan Power Co,* 131 Mich App 336, 343; 345 NW2d 918 (1984). In *Kalkaska Co, supra* at 402, after reviewing the aerial photographs relied upon by the trial court in concluding that there was a defined line, this Court held that clear visibility in aerial photographs was sufficient to prove the existence of a defined line. Similarly, in this case, after reviewing the exhibits relied upon by the trial court, although, as the trial court observed, there are "fade-out areas not as readily detected via the aerial [photographs]," we are convinced that the trial court did not clearly err in finding the existence of a defined line in this case. We defer to the trial court's superior ability to determine whether the roadway was defined inasmuch as the trial judge personally observed the disputed portion of the roadway and the detours. "As trier of the facts, a trial judge has wide discretion in his determination of the facts." *Keller v Locke,* 62 Mich App 591, 592; 233 N.W.2d 666 (1975). It is particularly inappropriate for this Court to substitute its judgment on a finding such as this when the trial judge personally observed the disputed section of the roadway in question.

Plaintiffs argue that roads that change with the elements do not have a defined line. In support of this argument, plaintiffs rely on the Supreme Court's decision in *Thunder Mountain Hts Land Corp v Van Buren Co Rd*

Comm, 342 Mich 88; 68 NW2d 765 (1955). In *Thunder Mountain,* the Supreme Court refused to hold that a road was a public road in part because the roadway, which, like the roadway in this case was also characterized by some testimony as being a trail, ran alongside a river and overflow from the river caused the road not to follow a "definite or established route." *Id.* at 90. We reject plaintiffs' reliance on *Thunder Mountain* because the facts of *Thunder Mountain* are distinguishable from the facts of this case. In *Thunder Mountain* the course of the roadway changed over the years because of the overflow from the river, whereas, in this case, the existence of the wetlands has not changed the course of the roadway; rather, the wetlands merely require the taking of detours at certain times of the year. The roadway in this case, unlike the roadway in *Thunder Mountain,* follows a "definite or established route" despite the detours. *Id.*

Regarding the second element necessary to establish a highway by user, plaintiffs argue that infrequent and minor maintenance will not make a public highway out of a private road. According to plaintiffs, there are only three documented instances of public work on the portion of the roadway in question, and this is insufficient to establish that the road was used and worked on by public authorities. Moreover, plaintiffs contend that the fact that the portion of the road in dispute is not reasonably passable is evidence that defendant road commission's use and work on the disputed road was not sufficient to establish this element of a highway by user. Again, we disagree.

Plaintiffs are correct that public authorities must engage in more than infrequent, minor maintenance to satisfy this element of a highway by user. See *Keller, supra* at 592-593. However, the nature of the road must also be

considered in determining whether this element is satisfied. See *Pulleyblank v Mason Co Rd Comm,* 350 Mich 223, 229; 86 NW2d 309 (1957). Because the disputed portion of the road in question was a quiet country two-track road with only a minimal amount of traffic, defendant road commission's work on the road was not required to be extensive to satisfy the public work element of a highway by user. "Work on country roads . . . is adjusted also to the needs of local traffic and local inhabitants." *Id.* While we recognize that the work done by defendant on the portion of the road in dispute was not extensive, given the nature of the road, defendant was not required to expend large amounts of money improving and maintaining it or large amounts of time working on it to satisfy this element of a highway by user.

Moreover, plaintiffs' contention that the trial court could only consider defendants' use and work on the disputed portion of Darr Road in determining whether defendants established this element of a highway by user is incorrect. In fact, the trial court was permitted to consider the maintenance efforts and work directed at areas of Darr Road that are not in dispute rather than limiting its concentration to the one-mile section of Darr Road that is in dispute. "'It is not essential that every part of a highway should be worked in order to evidence the intention of the public authorities to accept and maintain the entire highway.'" *Kalkaska Co, supra* at 402, quoting *Neal v Gilmore,* 141 Mich 519, 527; 104 NW 609 (1905). Therefore, the trial court did not err in considering work performed by defendants on portions of Darr Road outside the disputed portion of the roadway in this case.

Plaintiffs argue that establishing the second element of a highway by user requires defendant to maintain the

road in a manner that renders it reasonably passable. A party asserting a highway by user is required to show acceptance of the road in question; however, the degree of maintenance required to demonstrate such acceptance is merely enough to keep the road in a "reasonably passable condition." *Boone v Antrim Co Bd of Rd Comm'rs,* 177 Mich App 688, 694; 442 NW2d 725 (1989). Defendant does not contest that the section of the roadway in question was not always passable. At trial, there was testimony that the road sometimes becomes temporarily impassable during certain wet times of the year and that vehicles attempting to travel over the road would sometimes become stuck. There was also testimony that mud boggers,[3] who were prone to driving on the disputed section of the roadway, contributed to the impassability of the road.

In its opinion, the trial court observed that the portion of Darr Road in dispute "would not be passable in places during the spring and possibly into the summer due to snow melt off and spring rains and at times in the late fall due to November rains at the location of the wetland marsh and the bog area." The trial court opined that one would need a four-wheel-drive vehicle to successfully pass through the bog area. Nevertheless, the trial court, relying on the Supreme Court's opinions in *Indian Club v Lake Co Rd Comm'rs,* 370 Mich 87; 120 NW2d 823 (1963); *Pulleyblank, supra*; *Alton v Meeuwenberg,* 108 Mich 629; 66 NW 571 (1896), characterized the existence of the two wet areas as "a localized problem" that "would not defeat a finding that there has been public user."

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[3] Mud bogging was described in the record as a recreational activity in which people put extra large tires on their vehicles and then drive them through the mud.

We hold that the disputed portion of the roadway was reasonably passable. Our Supreme Court has concluded that roadways are reasonably passable even when the weather renders the roadway temporarily impassable or when a detour is necessary to render a roadway passable. In *Indian Club, supra*, at 91, our Supreme Court held that a "trail" was reasonably passable, despite the fact that it was not passable "after the winter snows." Similarly, the Supreme Court's decision in *Pulleyblank* supports the conclusion that the existence of a detour would not preclude a finding of a highway by user. In *Pulleyblank*, *supra* at 231, the Supreme Court stated:

> At the trial some effort was made by appellants to show that the Benson road, at a certain point, really included a detour . . . , the theory (disputed by defendants) being that Benson road itself was always impassable at this point and that detour was necessary. This theory was apparently not persuasive to the chancellor . . . and we are not persuaded he was in error therein.

In light of the Supreme Court's decisions in *Indian Club* and *Pulleyblank* and the fact that the trial judge personally observed the wet areas and the detours and determined that the section of the roadway was reasonably passable despite the existence of the wetlands, we conclude that the trial court did not clearly err in concluding that the portion of Darr Road in dispute was reasonably passable.

Regarding the final requirements of a highway by user that there be open, notorious, and exclusive public travel and use for ten consecutive years, plaintiffs argue that the existence of "road closed," "dead end," and "no trespassing" signs posted on or near the disputed portion

of the roadway since the 1950s means that any use of the disputed portion of Darr Road would constitute a trespass and would be insufficient to establish the public use element of a highway by user. We disagree.

The public use element "requires evidence of use of the roadway claimed to be a highway by user by members of the *general* public, not merely by employees of a governmental entity, on a repeated basis for the requisite ten-year period." *Cimock, supra* at 87 (emphasis in original). However, "this does not require constant or continuous use by the general public over the course of a ten-year period." *Id.* at 87, n 3. Moreover, the law does not fix the number of people who must travel upon a road to satisfy this element. *Kalkaska Co, supra* at 403. "[I]t is sufficient if the road was traveled as much as the circumstances of the surrounding population and their business required." *Id.* Furthermore, a road used by the public for gaining access to areas for hunting and recreation may satisfy the public use requirement. *Id.* However, the road must be used by members of the general public and not merely the friends and family of people living on the road. See *Cimock, supra* at 87-88.

The trial court found that the public's use of the portion of the road in question satisfied the last two elements necessary to establish a highway by user. Specifically, the trial court noted that the record was "replete with examples of hunter usage, horseback riding, snowmobile riding, cross-country skiers, four-wheel drive vehicle usage, and bog runner usage" and concluded that "public usage has been open and notorious and although not high numerically, said farming and recreational usage has been shown to have lasted from the 1930's until the present."

We find that the record supports the trial court's assertion that the final two elements necessary to establish a highway by user were present. Ron Campbell, who owned plaintiff Alfred Villadsen's property from 1977 to 1997, testified that during that time, he saw people use the portion of Darr Road in dispute for deer and raccoon hunting, horseback riding, snowmobiling, and bog running. In addition, Campbell testified that he farmed the property he owned at the time and that buyers would come to his farm to purchase oat and wheat seed, hay, and calves. Although, as the trial court observed, the number of people who traversed the road was not high, the law does not fix the number of people who must travel upon a road to satisfy this element. *Roebuck v Mecosta Co Rd Comm,* 59 Mich App 128, 131; 229 NW2d 343 (1975). We hold that the portion of Darr Road in dispute was traveled as much as the circumstances of the surrounding population, and their business, required. *Id.* The only evidence of any business was Campbell's testimony regarding members of the public coming to his farm to purchase items. Other than the small amount of business traffic generated by Campbell's farm, the disputed roadway was a quiet country two-track road, which was used largely by the public for recreational purposes. Such recreational use is sufficient to satisfy the public use element. *Id.* Given the character of the road and the circumstances of the surrounding population, there was sufficient public use of the disputed roadway to satisfy the public use element of a highway by user.

Furthermore, we reject plaintiffs' contention that the existence of "road closed," "dead end," and "no outlet" signs on the disputed roadway or near the ends of the disputed roadway negates this element of highway by user. According

to plaintiffs, as a result of the placement of the "road closed" signs, any member of the public who traveled on the disputed portion of the road was a trespasser. Plaintiffs further contend that because of the signs, the public could not legally use the disputed roadway because it was closed to the public. There were also "no outlet" signs in place on each end of the disputed portion of the road at the time of trial. Although it is unclear from the record if defendant road commission or someone else put up most of the signs, it was not contested that the signs existed. According to testimony at trial, "dead-end" signs are no longer used, but they were used in the past "to indicate that there was a problem up ahead." Testimony indicated that a "road closed" sign would indicate that the use of caution is necessary, but would not necessarily mean that the road is closed to all vehicular traffic and would not render travel on such a road illegal. In addition, a "no outlet" sign indicates that it would be difficult to get through a road.

The trial court's conclusions "that a road closed sign is intended to serve as a warning the road may be impassable" and that "it is not illegal to travel on such a closed road" are supported by the record. Although the record was not clear regarding who placed most of the signs, even if defendant road commission erected all the signs, such conduct would constitute evidence of public maintenance of the disputed road under the second element of a highway by user. In any event, regardless of who installed the signs, it is clear from the record that they were regularly ignored by the members of the public who used the road in dispute over the years. In other words, the public used the roadway in spite of the signs. Therefore, because the public used the roadway, the public use element of the

highway by user was established in spite of the existence of signs.

We further hold, contrary to plaintiffs' argument on appeal, that the second and third elements necessary to establish a highway by user existed during the same ten-year period. In fact, we conclude that the evidence established that the public use and the public work and maintenance elements of a highway by user were established for a 20-year period, from approximately 1977 to 1997.

Regarding the public work and maintenance element, Richard Hansen, the road commission's assistant superintendent from 1968 through about 1984 and its superintendent from 1984 until 1987, testified that he drove and inspected the disputed portion of the road every year as a part of his normal duties. Hansen also asserted that in the late 1970s or early 1980s, the road commission hauled gravel north of the Freeman drain bridge on the disputed portion of Darr Road. Hansen further asserted that the road commission did some plowing of at least a portion of the disputed roadway. Hansen also testified that in 1986, after a heavy rain, the road commission made repairs to the Lincoln River bridge. Finally, Hansen testified that the road commission consistently pulled out vehicles that had become stuck in the disputed portion of the roadway. In addition, David Hasenbank, the Mason County Drain Commissioner, testified that in 1987 the road commission cleaned out the Freeman Drain. Furthermore, Ron Campbell testified that the road commission cut brush in the ditches on the disputed roadway just about every year. He also asserted that the road commission graded and snowplowed the area that used to be his driveway north to Fountain Road.

Regarding the public use element, Campbell's testimony, which was detailed above, established that there was public use of the disputed portion of the roadway from 1977 to 1997 for recreational purposes and for business associated with Campbell's farm.

On the basis of the testimony of Richard Hansen, David Hasenbank, and Ron Campbell, we conclude that the evidence did establish that the public use and public authorities' work and use of the disputed roadway did occur during the same 20-year period, from 1977 to 1997.

To the extent that plaintiffs suggest that the trial court erred in relying on testimony that defendants might need the disputed portion of the road in the future in concluding that the section of the road in question was a highway by user, we disagree. Plaintiffs' appellate brief does not cite any case law or statutory authority to support their contention that the trial court's alleged reliance on the testimony regarding the future public use of the road was improper. A party who fails to brief the merits of an alleged error has abandoned the issue on appeal. *Yee v Shiawassee Co Bd of Comm'rs,* 251 Mich App 379, 406; 651 NW2d 756 (2002). "It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *Id.,* quoting *Mitcham v Detroit,* 355 Mich 182, 203; 94 NW2d 388 (1959). Even if the trial court did note that defendants might need the disputed portion of the road in the future for some public use, this would not alter the fact that defendants established the elements necessary to establish a highway by user under MCL 221.20.

Plaintiffs next argue that even if the portion of Darr Road at issue did, at some point, become a highway by user, defendants abandoned the disputed section of the road by failing to maintain it and by putting up "road closed" signs. We disagree.

This Court reviews for clear error a trial court's factual findings following a bench trial; however, legal conclusions are reviewed de novo. *Essexville v Carrollton Concrete Mix, Inc,* 259 Mich App 257, 265; 673 NW2d 815 (2003).

"A roadway established for public use may cease to be such by voluntary abandonment and nonuse." *Ambs v Kalamazoo Co Rd Comm,* 255 Mich App 637, 652; 662 NW2d 424 (2003). To prove abandonment, "both an intent to relinquish the property and external acts putting that intention into effect must be shown by the party asserting abandonment." *Id.* "Nonuse alone is insufficient to prove abandonment." *Sparling Plastic Industries, Inc v Sparling,* 229 Mich App 704, 718; 583 NW2d 232 (1998).

We hold that the trial court properly concluded that defendants had never abandoned the portion of Darr Road in dispute. At trial, there was no evidence that defendants intended to relinquish the property and there was no evidence regarding any external acts done by them indicating an intent to abandon the disputed roadway. Plaintiffs contend that defendants' failure to improve, maintain, or make the road reasonably passable, as well as the placement of signs at each end of the disputed portion of the road, constituted external acts done by the road commission to show its intent to relinquish the property. However, mere nonuse is insufficient to prove abandonment, *Sparling Plastic, supra* at 718, and, even if it were,

the record does not support plaintiffs' contention that the road commission failed to maintain the disputed portion of the roadway. Although it did not engage in an abundance of maintenance and work on the disputed roadway over the years, the record reveals that the road commission's care and maintenance of the roadway was sufficient and consistent with the character of the roadway. The record reveals that the road commission maintained the disputed roadway as it would any country two-track road. This maintenance, while not large in scope or expense, was sufficient to preclude a finding of abandonment. Moreover, the evidence at trial does not support plaintiffs' contention that the road commission's placement of signs at each end of the disputed roadway evidences defendants' intent to abandon or close the disputed roadway. Therefore, we hold that the trial court did not clearly err in concluding that defendants had not abandoned the portion of Darr Road in question.

Affirmed.

/s/ Peter D. O'Connell
/s/ Bill Schuette
/s/ Stephen L. Borrello

Court of Appeals, State of Michigan

ORDER

Alfred Villadsen v. Mason Cnty Road Comm

Docket No. 255955

LC No. 02-000348-CH

Peter D. O'Connell
Presiding Judge

Bill Schuette

Stephen L. Borrello
Judges

The Court orders that the motion for reconsideration is DENIED.

[SEAL] A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

Aug 30 2005 /s/ Sandra Schultz Mengel
Date Chief Clerk

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR
THE COUNTY OF MASON

ALFRED VILLADSEN, DONALD AND MARYLIN VILLADSEN, & JACK MICKEVICH

Plaintiffs,

-vs- File No. 02-348-CH

MASON COUNTY ROAD COMMISSION & SHERMAN TOWNSHIP

Defendants. /

OPINION

Plaintiffs filed their complaint on July 30, 2002 wherein they seek injunctive relief and to quiet title. A bench trial was held on August 20, 21, and 22, 2003 at which time David J. Anderson appeared for Plaintiffs and Attorney Kevin A. Elsenheimer appeared for Defendant Mason County Road Commission. The Court has had the benefit of briefs regarding motions for summary disposition as well as trial briefs submitted by each attorney. Based on the testimony and exhibits admitted at trial, the Court now renders its determination.

BACKGROUND

Darr Road is a north/south road in Mason County. Mason County has a north/south width of approximately 24 miles. Darr Road appears to be an established but intermittent section line road for 19 or 20 of those 24

miles. Darr Road is paved one mile at the south end and a little over a mile at the north end. The rest of Darr Road is an improved dirt/gravel road except for a stretch approximately 1½ miles long which is commonly referred to as a trail road and which in turn serves as the focus of our present dispute. Also it would be noted that the disputed one mile at the middle of said 1½ miles is at the north end of an uninterrupted four mile stretch of Darr Road bordered on the south by Decker Road and on the north by Fountain Road. US 31 lies one mile west of Darr Road and also runs in a north/south direction.

Approximately five years ago Plaintiff Alfred Villadsen inquired at the Road Commission whether the Road Commission was willing to vacate or abandon an approximate one mile portion of Darr Road which crossed his property. He was advised that he would have to petition for abandonment which was done. Initially the Road Commission indicated it favored abandonment but later said no. Approximately two years ago Mr. Villadsen learned and observed that Defendant had brought in a bulldozer by which it intended to improve or widen or otherwise maintain the portion of Darr Road which crossed Plaintiffs' property whereby Plaintiffs filed their present complaint for an injunction and to quiet title. Due to a consent order, the preliminary injunction hearing was not required in that Defendant agreed to hold off working on Darr Road until litigation in the present case was completed.

Plaintiff seeks to quiet title to the portion of Darr Road that begins 500 yards south of the centerline of Fountain Road to a point ¼ mile north of the centerline of Mavis Road which also would be the southern most property line of Jack Mickevich, one of the Plaintiffs herein.

The distance from Fountain Road to Mavis Road is 1½ miles. However because the disputed portion begins ¼ mile south of Fountain Road and ends ¼ mile north of Mavis Road the disputed length entails one mile. Plaintiff Alfred Villadsen owns approximately 400 acres which borders on Darr Road, and Plaintiff Jack Mickevich owns approximately 80 acres. Plaintiffs Donald and Marylin Villadsen are parents of Alfred who owned a parcel across the road from their son also on Darr Road. Defendant responds that Darr Road is a public highway under theories of "dedication and acceptance" and "user".

James Freeman, an uncle of Marylin Villadsen, had once owned the farm homestead where Alfred Villadsen was raised and where his mother had lived since the early 1930's. Mr. Freeman had worked his property for many years but had become ill with cancer in the late 1920's. He invited the parents of Marylin Villadsen to come to Sherman Township, Mason County, to live on his farm in order to take care of him during his last illness. Upon his death, title eventually passed to Donald and Marilyn Villadsen. Marilyn Villadsen's father had worked with the railroad while in Illinois, thus the couple had given up a secure job to come to Mason County during the Depression. Her father was able to secure work on the railroad in Mason County for one year after which they earned the family's livelihood as a dairy farm. Witness Campbell used the property for nearly twenty years to raise feed grain and cattle.

The Lincoln River crosses Darr Road between the Villadsen homestead driveway and Fountain Road. A bridge was installed over the Lincoln River and has been maintained by the Mason County Road Commission. Further, the Mason County Road Commission plows Darr

Road the first quarter mile. As one proceeds south past the Villadsen homestead, Darr Road becomes a trail road, it descends a few feet and the adjoining land becomes lowland and wetland terrain instead of pasture land. (See Plaintiffs Exhibit 1). Also at that point a county drain crosses Darr Road which is called the Freeman Drain which poetically to the east connected with "Frog Paradise" drain. (See Plaintiffs Exhibit 2 & 13). The wetland area immediately south of the Freeman Drain along Darr Road extends for approximately one city block and has been called the marsh wetland area during trial. (See Plaintiffs Exhibit 4 and Defendant's Exhibit 45). Farther south the road rises into high ground and continues through high ground for a block or so before it descends into what has been referred to during trial as the bog or blueberry marsh area. (See Plaintiffs Exhibit 9 & Defendants Exhibit 41). Plaintiffs contend that the first area, which they refer to as the marsh area and which the Court thinks of as the wetland area, and the second area which they refer to as the bog area, are not passable virtually all of the year due to standing water and unstable soil and that this impassability itself shows that Darr Road has not been maintained continuously or sufficiently to satisfy user requirements and that both locations but in particular the bog area shows that there is no defined line for Darr Road.

As indicated above, Plaintiff Alfred Villadsen was raised on the Freeman homestead. He reacquired the family farm from Witness Campbell and over the years has purchased additional acreage in the area. At one time he explored the possibility of creating a golf course. Due to the variety of terrain which includes pasturage, wetland areas, huckleberry marshes, and hardwood forest, it would

have provided an attractive setting. He also has explored the possibility of creating a game ranch. It is his position that Darr Road has never been a publicly "utilized" road and instead people would use it based on his family's so to speak "good will". He argues that for the Road Commission to now open it up would be especially problematical for him because it would create a thoroughfare down the center of his anticipated usage. Defendant counters with the argument that the Villadsens were always happy to have Darr Road treated as a public road in order to reach their homestead and that it rings wrong to have this benefit but to deny public use of the disputed strip. Defendant also notes that although the usage would have been less south of the homestead driveway, that a County drain crosses Darr Road at the north edge of the marsh wetland area and that County Drain Commission money was expended to have a cement bridge constructed over the drain. Further the Road Commission observes that Darr Road in general is being gradually improved and that our disputed mile lies at the north end of a four mile strip of Darr Road which has been gradually improved over the years to the point that it has been freshly graveled, contoured, and planted with shoulder vegetation all the way north to Mavis Road which is the first cross road on the south end of the disputed strip. The Road Commission argues that they have improved Darr Road as money allowed and as public usage has increased for matters such as hunting, snowmobiling, sightseeing, horseback riding, some residential usage, and traffic to and from the Fin and Feather Club which is a hunting club located approximately 1½ miles to the south on Darr Road. Defendant espouses theories of "dedication and acceptance" and/or Public Highway by User. Further, Defendant argues that even if the Court does not determine

dedication and acceptance has been established, that the features which do exist regarding dedication, acceptance, and McNitt certification, nevertheless provide support for the idea that historically Darr Road was treated as a public road. Further, Defendant argues that at no time has anyone sought to put a gate across the disputed portion of Darr Road and that even the private no trespassing signs are oriented so that they refer to the wooded areas and fields alongside Darr Road rather than Darr Road itself.

COURT VIEW

The Court with consent/suggestion of the parties at trial conducted its solo view of the premises on September 8, 2003. The Court agrees with Plaintiff that Darr Road would not be passable in places during the spring and possibly into the summer due to snow melt off and spring rains and at times in the late fall due to November rains at the location of the wetland marsh and the bog area. However, it is significant to the Court that the wetland portion of Darr Road immediately south of Freeman Drain has an elevated roadbed plus very moderate ditching on the east side of the marsh roadbed. (See Defendant's Exhibit 38 & 40). This modestly elevated roadbed would be consistent with witness testimony that Darr Road had been used to haul excavated topsoil from the field areas to the east of Darr Road. At the time of the Court's visit the entire wetland area was dry. Based upon the numerous trees in the wetland area of which the maples were especially large (See Defendants Exhibit 46), the Court notes that the spring flooding and late fall flooding does not mean the road was not otherwise passable as the wetlands dried out. In fact the roadbed in the wetland was distinctly visible. Such drying out of a wetland is rather common in

this type of lowland area. It is also accurate that there is a two-track bypass that swings around the east side of the wetland forest along the field that borders the wetland. This trail carries virtually all of the present traffic. However it is a trail of convenience in that the field area is just high enough that it does not constitute a wetland terrain so traffic would more readily and consistently use the bypass. This usage however does not negate the fact that the roadbed is easily visible and available for use during dry periods. The Court also noted that top branches of what probably was an elm tree laid across the south end of the wetland at the junction of the bypass. No one had evidently bothered to pull those dead branches aside. There were rather fresh tire tracks evidently made by a jeep or four wheel vehicle that had crunched its way around those branches on the west edge of the road; i.e. the elevated roadbed is readily accessible if one wishes to remove the brush. To the south of the wetland area the road gradually rises to high ground, The Court noticed the old dump referred to by Marylin Villadsen along the west side as the road went up the modest hill. (See Plaintiffs Exhibit 14). The modest hill also has a cut on the side of the road. One could readily see that dirt had been removed from the cut years ago presumably to enhance the roadbed in the wetland which lies immediately to the north.

Plaintiffs' strongest argument for impassability rests with what Plaintiff has referred to as the bog area which is a part of the blueberry marsh. Mrs. Villadsen testified that the blueberry marsh even has a portion that is a floating bog where one can, while walking or picking blueberries, notice the ground itself for several feet will wave up and down. Such a quaking feature means there is actually water under the surface dirt and vegetation. The

Court is familiar with such features and recognizes that a road across such an area would quickly result in a sinkhole. It was of interest when the Court visited the bog area that there is also a cut immediately to the south of the bog where one comes down from high ground to the blueberry marsh. Here again one can see where fresh borrowed dirt has been utilized presumably by the Road Commission a couple years ago but also one can detect old cuts that were done years ago presumably to also furnish dirt or sand for the road in the bog area. During trial the Court asked whether the deep water filled tire ruts referred to in testimony had solid ground between the ruts so that a vehicle could straddle ruts and thereby cross the bog. For example Beyer Road, which the court visited two or three years ago to view a road access dispute and is only a couple miles north of this immediate area, had very similar swampy terrain. However it was relatively easy to straddle the ruts on Beyer Road because the soil between the tire ruts was mostly sand and dirt and the area between the deep ruts was sufficiently firm to support a normal car. The Court drove almost two miles through such terrain in a two-wheel drive car in order to reach its view of the disputed area. Because of the proximity of the two areas and the straddle feature, the Court inquired during our trial and noted during its view what type of soil was involved in both the north wetland area by the Freeman Drain and the blueberry bog area. The Court noted with interest that evidently a tractor had recently utilized Darr Road in the bog area because one could see a fresh single deep tire rut where the tractor's tire on the east side of the road had buried itself down to the axle or a depth of approximately 18 inches deep and 3 feet long. The soil was pure black dirt which would have been muck if saturated with water. However on September 8, 2003 it was clear

that the black dirt was moderately dry and moderately firm not unlike the terrain where farmers grow celery. The Court determines from this view that in the bog area one would not find a solid or hard surface between water filled tracks. However the soil was not so soft or saturated that it constitutes quagmire, or impassable muck, or was not moderately firm in the roadbed in part because the roadbed had become sod-like due to grass and weeds. It is apparent that the blueberry marsh is an old lake bed. The Court believes Mrs. Villadsen when she says that there are portions where the ground quakes. However the Court did not detect this feature on the portion of Darr Road that crosses the bog area. There was one stretch along Darr Road in the bog approximately 12 feet long that did have a very apparent muck feature. One could see remnants of small logs and wood sticking out of the muck where earlier persons had sought to firm up the mud presumably in order to get unstuck and to drive across. Tire tracks were visible where vehicles had sought to get around the visible mud by keeping the two outside tires on the grassy surface on the edge of the road on the east side. The Court readily agrees with Plaintiffs testimony that in order to successfully do so, one would need a four wheel drive vehicle and some skill as to keeping one's momentum as they drove past this fragile area. The stretch of open mud was approximately 12 feet in length. The entire bog area, as testified in trial, is approximately 100 to 150 yards long. It is typical blueberry marsh in that there are hummocks of ground which support blueberry/huckleberry bushes, other types of low lying bushes, sphagnum moss, and narrow wet areas or surface channels between the hummocks which would hold standing water in the spring and late fall but which were dry when the Court visited the marsh. When one picks blueberries in such a marsh, the channels

are where one normally walks. The blueberry marsh in the bog area was evidently frequently wet in that there were no trees growing out of it except for some four inch diameter dead trees that probably died from the flooding of the heavy rains in September of 1988. There were very few old or dead trees or young trees growing in the marsh area. Nevertheless the north/south line of Darr Road was distinct through the marsh and this line would be consistent with Mrs. Villadsen's testimony that when she visited one of her girlfriends as a child in the mid to late 1930's, that she was able to cross the bog on horseback via a path. Further at the present time one can readily see where certain vehicles such as a jeep or four-wheel drive pick-up could cross the bog in that there is a clearly defined grassy roadbed that exists due to usage. Except for the approximately 12 foot muddy area, the rest of the road as it crossed the bog did not have deep ruts. Vehicles were getting past the mud by keeping two tires on the grassy-shrub road edge while the other two tires engaged the mud area. Last, regarding the Court's visit, Alfred Villadsen was correct when he described the Freeman Drain water as having standing water in it which came up to the bottom of the cement culvert which went under the lane road which Witness Campbell stated would normally have drained the marsh area. (See Defendant's Exhibit 39). In other words if there had been more water in the drain, it would have drained into the marsh area instead of vice-versa yet if the marsh area had been filled with water, then the culvert would have had some drain effect from the marsh area into the drain.

HIGHWAY BY USER:

The highway by user statute, MCL 221.20 states as follows:

> All highways regularly established in pursuance of existing laws, all roads that shall have been used as such for ten years or more, whether any record or other proof exists that they were ever established as highways or not, and all roads which have been or which may hereafter laid out and not recorded, and which shall have been used eight years or more, shall be deemed public highways, subject to be altered or discontinued according to the provisions of this act. All highways that are or may become such by time and use, shall be four rods (66 feet) in width, and where they are situated on section or quarter section lines, such lines shall be the center of such roads, and the lands belonging to such roads shall be two rods in width on each side of such lines.

Per case law there are four elements which are required to be established in order to prove a road constitutes a public highway by user. The early time honored case *Alton v Meeuwenberg,* 108 Mich 629 (1896) is interesting in that the Michigan Supreme Court quotes at length the trial court's *jury charge* and held "pursuant to precedent", that said jury charge "was a fair and full presentation of the law, in all its phases, ... " The trial judge was J. Palmer, of Newaygo County whose picture still hangs in the Newaygo County Circuit Courtroom. The jury charge elements regarding "user" commence on page 636 and are stated as follows:

> "There is another mode of creating a highway, under the statute, in this State and that is by

> user. But, to constitute a highway by user, there must be a defined line, and it must be used and worked upon by the public authorities, and traveled over and used, for ten consecutive years, without interruption. It must be such a road that the public have exclusive possession of, as against the owner of the soil or any other person, – the exclusive right. . . . It must be open; it must be notorious; it must be accepted by the public generally; it must be traveled upon as a public highway, and the possession of the public must be exclusive, so that if any person entered upon the premises and sought to use it in a manner other than as a public highway, the public authorities would have an action against such person for trespass upon the road."

In more recent times the case *Missaukee Lakes Land Company v Missaukee County Road Commission,* 333 Mich 372 (1952) reaffirms *Meeuwenberg* as follows:

> "To constitute a highway by user, there must be a defined line, and it must be used and worked upon by the public authorities, and traveled over and used by the public, for ten consecutive years, without interruption, and the possession thereof by the public must be open, notorious, and exclusive." *Alton v Meeuwenberg,* 108 Mich 629 syllabi

1. Defined Line:

As stated earlier in this opinion, Darr Road runs the full north/south 24 mile width of Mason County with the exception of about 2½ miles where there is no road at all. Where the road exists, it is clearly a section line road its entire length. The north ¼ mile of Darr Road at its terminus on Fountain Road includes a county bridge over the

Lincoln River. The south ¼ mile of the 1½ miles from Fountain Road to Mavis Road exists in a well defined graded manner. The mid portion of said 1½ miles is the disputed one mile. It is a trail road which intermittently is a two-track with stretches of roadbed and leveled surface. During a hearing on our case last spring, this Court mentioned that at a trial several years ago, a county surveyor told the Court that a road on a section line usually means it was originally intended as a public road. Although this Court recognizes that no particular case law has been cited in support of this observation, the Court has read with interest Defendant's materials supplied pursuant to Plaintiffs' motion for partial summary disposition scheduled for March 11, 2003. Defendant's attorney Kevin A. Elsenheimer provided a document labeled Exhibit E entitled *"TERRITORIAL LAWS" of 1833* which states as follows:

> AN ACT to regulate HIGHWAYS.
>
> Section 1. Be it enacted by the legislative counsel of the territory of Michigan, . . . Provided, That the course and distance of the commencement and termination of all roads, to be hereafter laid out and established, shall be ascertained from the nearest corner or quarter-section stake." . . .

The portion of Darr Road involved in our case starts on Fountain Road on the section line between Sections 17 and 18 of Sherman Township. In fact Plaintiffs accept that Darr Road is a public highway for its first quarter mile south of Fountain Road. When one visits Darr Road, it visually appears to run in a true and straight north/south line across Plaintiffs' farm property and in a true straight line south through the wetland area and it continues as a straight line through the woods, across the blueberry bog

area, all the way to Mavis Road. The meandering argued by Defendant is very minimal and at the most shows some shifting of the edge of the road where a tree might encroach but such shifting is always well within the road right-of-way; to wit, the Court detected no shifting over four or five feet in direction. (See Plaintiffs Exhibit 14 and Defendant's Exhibit 36). Further, where such shifting has occurred, the road resumes its direct north/south direction subsequent thereto. Further, the junction at Mavis Road lines up with the north/south portion of Darr Road that continues southerly from Mavis Road. (See Plaintiff's Exhibit 11). The width is different in that at Mavis to the north Darr Road is only a trail approximately one blade wide whereas south it is freshly graveled with two-way traffic. Nevertheless the directional lineup is consistent with it serving as a section line road. Plaintiffs' Exhibit 29 is an aerial evidently taken in 1995 which was offered to show a bypass road around the marshy area and a bypass road referred to as the Ridge Road which has been used to bypass the blueberry marsh/bog area. However, Exhibit 29 shows a distinct north/south line not only in the marshy area but also in the bog area. Granted there are fade-out areas not as readily detected via the aerial, but where the road is visible the various sections line up in a north/south direction all the way from Fountain to Mavis Road. Thus, although the bypass roads have received greater usage in the area of the north wetland and the south blueberry bog, the aerial shows a defined line and the Court's view confirms the existence of the defined line. See also Exhibit 47 which is an aerial regarding Section 17 to the same effect. Exhibits 20 and 22 are highly significant historically in that this aerial was taken in 1938 and Darr Road again appears as a distinct north/south road separating Sections 17 and 18. Exhibit 24, an aerial from 1953, shows

the same consistency of the road line as does Exhibit 28 from 1958.

2. Use and Work by Public Authorities:

As stated earlier, Darr Road lies between Section 17 and 18 of Sherman Township. Even prior to the Freeland deed "for highway purposes" to Sherman Township, there is evidence that Sherman Township was allocating money along this section line. (See Defendant's Exhibit 17 regarding a 1905 expenditure of $100.00 and Defendant's Exhibit 18 regarding a 1916 expenditure of $50.00). The business records do not always show exactly where the money was spent, yet such records clearly show an interest by public authorities in the section line road between Sections 17 and 18 of Sherman Township. Further, the April 5, 1915 minutes of the Sherman Township Board shows that $100.00 was authorized. In February of 1916 an additional $50.00 was authorized for fill. Next was the acquisition (See Defendant's Exhibit 1) of said easement for highway purposes from James Freeman. Next, presumably during the summer of 1919, the Freeman Drain Bridge was built. In 1934 the Road Commission indicated the disputed strip was a part of their McNitt claim. In 1958 there was repair work done on the Lincoln River Bridge. Graveling was done on the first quarter mile off Fountain Road in 1964. Finally, in more recent times, Darr Road was graded and landscaped in 1995 up to Mavis Road. In 2001 the Mason County Road Commission spent approximately $3,342.80 on a portion of the disputed strip when crews were sent in to bulldoze the road and clear away stumps. Further, Assistant Road Commission Superintendent Hansen testified that he drove the road annually to comply with McNitt certification. Although he did not wish to cross the

Freeman Drain Bridge because it had no side rails, he nevertheless visited the entire road during the dry time of the year in compliance with McNitt requirements by coming in from both directions. Although the Court recognizes that most case law does not give much weight to McNitt Act claims, such a claim is nevertheless an indicator that highway authorities regarded Darr Road as a public road including the disputed strip in this case. Exhibit 40 shows the same drainage ditch observed by the Court when it conducted its view along the elevated portion of Darr Road which crossed the wetland area. Both the *Pulleyblank* and *Kalkaska* cases as well as the *Indian Club* case confirm that roads can be worked upon at different locations and as the circumstances require in order to show acceptance by public authorities. The Court is persuaded that the expenditures by Sherman Township and the maintenance by the Mason County Road Commission was sufficient to show the disputed portion was accepted as a public road by said authorities; that the maintenance was in correlation with the degree of desired public usage in that the location is a recreational area with some desire for access to Fountain Road as well as frequent usage by hunters.

3. Public, Travel and Use for Ten Consecutive Years Without Interruption:

Plaintiffs raise a rather salient issue under this element when they argue that the bog area is virtually impassable except for hikers, horseback riders, snowmobilers and cross-country skiers in the winter. Also Plaintiffs argue that the marsh area immediately south of the Freeman Drain is flooded from the time snow melts through most of the summer and it floods again late in the fail. Further

Plaintiffs argue that the bypass at the marsh area and the bypass at the bog area show Darr Road is not passable because people choose to use both bypasses. It is of interest that the landmark *Meeuwenberg* case also involved a marsh. The *Meeuwenberg* court observed that the section of the user road "in the marsh area" had very little traffic compared to the remainder of the road. The jury nevertheless found highway by user and the Michigan Supreme Court was satisfied the evidence supported that decision. Also the case *Indian Club v Lake County Road Commission,* 370 Mich 87 (1963), involved a short stretch where the road came too close to a person's house and the Road Commission shifted the road away from the house and curtilege which in turn would have meant the shift would not have qualified under the ten year requirement period. The *Indian Club* case is instructive in that the muddy area observed by this Court in the bog area is only roughly twelve feet in length, and with some self-help via logs and skirting the area, traffic has been able to get around the muddy spot. By analogy, this Court finds that the *Indian Club* diversion and the *Meeuwenberg* marshy area both support the proposition that such a localized problem would not defeat a finding that there has been public user. This point is further supported by the fact that Mrs. Villadsen testified that she was able to cross the bog area on horseback and other testimony has supported successful crossings using four-wheel drive vehicles, horses, skis, and snowmobiles. The unpublished case *Elmhurst v Cheboygan County Road Commission,* dated September 17, 2002 is also instructive in that although the language of the case pertains to a claim of abandonment, the *Elmhurst* court held that usage of non-graveled portion of a road as a foot path alone may be sufficient to negate abandonment. In our case Alfred Villadsen testified he has

seen cross-country skiers use Darr Road a couple of times a year as did Mr. Campbell. Further, there was testimony that two or three homes had horses in the area and would ride a loop through Darr Road up to Fountain Road and back over to US 31 evidently and from there down to Mavis. Thus, the Court finds that neither the bog area in general, nor the muddy spot observed by the Court, nor the wetland marsh area were so inhospitable that horses, hikers, cross-country skiers, four-wheel drive vehicles, nor hunters as testified to by Witness Campbell, could not cross the bog area and the wetland marsh area successfully.

Further Plaintiffs' argument that the two bypasses at the marsh area and the bog area also show the road was not kept in a passable condition does not control in that the Mason County case *Pulleyblank v Mason County Road Commission,* 350 Mich 223 (1957), which dealt with an acceptance issue based on public usage, observed that Benson Road north of Ford Lake and Thunder Lake meandered to an extent as it skirted each lake, and in particular the *Pulleyblank* court noted on page 231 that there was a detour where Benson Road at times was impassable. The *Pulleyblank* court affirmed the trial court when it declined to adopt the detour as a reason to show Benson Road was impassable. Although the evidentiary nature of the finding is not clearly developed in the *Pulleyblank* Supreme Court case, there is supporting inference that detours alone would not disqualify a finding of public usage. Similarly on page 230 the *Pulleyblank* court held that no matter how crude and rough the condition of travel may be, common use by the public and the expenditure of funds for upkeep and maintenance allows for a determination that public use had been established.

In our present case the testimony of Witness Saya is very important in that he has been, except for a few months in the military, a life-long resident of Sherman Township. He lived a mile or two east of Darr Road. He presently is 70 years old. He testified that he used Darr Road for hunting purposes when he was young and that his father used Darr Road during the 1930's or 1940's to do custom work for farmers who lived off of Fountain Road. Custom work meant that someone owned rather expensive or unique equipment not possessed by another farm and the farmer with the equipment would be hired to do particular work such as thrashing. Mr Saya testified that his father used Darr Road in order to reach Fountain road across the disputed one mile to do custom farming work. Further, he testified he has seen other private cars presumably from Manistee or elsewhere use the disputed one mile strip of Darr Road and that because he knew all the local people, those cars he did not recognize were from the general public and not simply local traffic.

In this case we not only have the bridge maintained for public use by the Mason County Road Commission which crosses the Lincoln River immediately south of Fountain Road, we also have the Freeman Drain Bridge built by Henry Stark during the time period December 27, 1918 through September 1, 1919. See Plaintiffs Exhibit 26. It is the Court's understanding that Henry Stark would have owned approximately eighty acres adjoining the present disputed strip. Clearly the bridge would have benefited Mr. Stark. However, it is of interest that the contract Mr. Stark signed is not as a private property owner, but instead had to meet the specifications set by the Mason County Drain Commissioner. The terms of the contract show that the bridge was to be erected on the

section line between Section 17 and 18 of Sherman Township and among other specifications the abutments were to be 18 feet long and 8 feet high with 5 foot wings on each end plus the ratio of "good sand gravel and mixed with cement five and one for abutments and cover on the bridge to be four and one" shows the significant strength and load the bridge would have been intended to handle. It is of interest that the bridge was built on the section line and certainly it was strong enough to handle public vehicles and loads common to that time period but also even into more modern times. Regarding such usage, Alfred Villadsen testified that when they would see a car going past their drive heading south on Darr Road, his father would mention, "It won't be long until somebody will be coming back and we will have to pull the car out." This observation is consistent with Witness Richard Hansen who retired from the Road Commission in 1986 and had started working there in 1952. He stated people would occasionally call the Road Commission to be pulled out of Darr Road and that occurred quite regularly in the early spring and late fall. Just as the Freeman Drain Bridge was built to handle significant road traffic, the tendency for people to use Darr Road and call the Road Commission when they became stuck, indicates the public felt the Road Commission was responsible for Darr Road as a public road. Witness Saya observed that there was a time in the 1980's when bog runners had made Darr Road impassable. Witness Joe Fiers, also a Mason County Road Commission employee for the last eight years, remembers a time period in the early to mid 1980's when he was active with the bog running crowd. He stated that there would be any place from two up to several bog runners using Darr Road some of whom he knew and others were strangers. He said Darr Road was "known by everyone" in the bog running circles.

He said his bog runner was street legal and insured. He acknowledged that the bog runners created ruts and that Darr Road would not then be suitable for cars. This testimony dovetails with Witness Saya who said his father and Mr. Saya had used Darr Road for hunting and farm access purposes during the 1940's and 1950's but that his son also was a mud bogger and the road later became impassable due to mud bog holes in the 1980's. Despite the resulting damage to the road bed at the bog, this usage was by the public!

Again, due to such impassability from bog runner usage, Plaintiff maintains Darr Road was not adequately maintained by the Road Commission under the theory that the Road Commission had abandoned any intent to maintain Darr Road as a public road. In conjunction with this argument Plaintiff observes that the Road Commission even placed "road closed" signs at the entrance off Mavis Road and also just north of the Freeman Drain. The Court is persuaded by Mr. Dittmer's testimony and Mr. Coleman's accepted deposition testimony that a road closed sign is intended to serve as a warning the road may be impassable. In other words it is not illegal to travel on such a closed road, but that one is using it at his own risk. The fact that the Road Commission itself placed the signs indicates the Road Commission felt it was responsible for the road without it meaning that the road has been abandoned. In the unpublished case *Elmhurst v Cheboygan County Road Commission,* released September 17, 2002 the Michigan Court of Appeals observed that the placing of "Road Ends" signs at the end of a gravel portion of a road where the manager of the Road Commission testified the Commission had no intent to abandon the disputed portion was properly accepted by the trial court as evidence the

Road Commission did not intend to abandon the disputed strip and that the use of the road beyond the gravel portion as a foot path also "alone may be sufficient to negate abandonment". Some weight may also be attached to the case "In re *Petition of Carson,* 362 Mich, 409 (1961), where the Michigan Supreme Court held that a platted road could not be vacated over objection where lot owners had used the undeveloped road as a foot path and observed the trial court did not err in considering that the use of the area as a foot path constituted a contemplated use as a roadway". As heretofore stated, clearly before the bog runners Darr Road was passable during dry portions of the season and even after the bog runner damage the road continued to be used by four-wheel drive vehicles, cross county [sic] skiers, snowmobiles, and horseback riders.

Finally Witness Ronald Campbell's testimony is interesting in that he purchased and lived on the Villadsen homestead from 1977 through 1997 and owned 360 acres. He in turn sold his property to Alfred Villadsen. He testified that people entered Darr Road off Fountain Road and that his customers for beef, hay and grain also used Darr Road to reach the pasture area south of Freeman Drain but north of the bog area. He observed that some people would explore Darr Road. He believed they would have come from the Fin and Feather Club which lies about 1½ miles south of the disputed strip. He testified that at times a normal car could traverse the entire road if it avoided ruts. He also observed there was a drain to the east of Darr Road that went under a farm lane which extended from Darr Road to the pasture area. He observed that the drain had a tendency to become plugged, but when it was kept open, the marsh area immediately south of the Freeman Drain would drain much faster. He testified that

he himself rode horses on the disputed mile as did two or three others in the immediate area. Mr. Campbell showed pictures of the plugged culvert. (See Exhibits 39 and 40). Also he showed Exhibits 38 and 41 through 46 taken on September 30, 2002 showing the disputed strips in the bog and wetlands were dry and passable. In particular his Exhibits 41 and 45 were offered to counter Plaintiffs' Exhibits 4 and 9 as well as Defendant's 43 and Plaintiffs' 5. Last he provided the curious information that the mud boggers did make the road impassable but that he did not particularly mind it because otherwise people would shine deer on his pastureland and that the road damage made it more difficult for shiners to have access to shine. He stated deer would be spooked by shining which caused them to run and hit his electric cattle fence which would then short circuit and cattle would escape.

All in all it is clear that the mud boggers created a problem on Darr Road, yet none of the owners along Darr Road from the mile and a half from Mavis to Fountain Road ever sought to gate Darr Road or chain Darr Road. This is significant circumstantial evidence that the adjacent land owners, although they did not necessarily favor bog runners or even snowmobiles, did not take steps to close Darr Road. Further, Witness Alfred Villadsen testified that the cars his father had to pull out were attempting to cross the bog area yet no one ever posted "no trespassing" signs for the road itself.

The case *Roebuck v Mecosta Road Commission,* 59 Mich App, 128 also has some local interest in that Mecosta County is an adjoining county to the 51st Circuit. In *Roebuck* the Colfax Township Road Commission was asked to purchase the north 33 feet of a ten acre parcel so that a private owner would have access to M-20. Colfax Township

records show that the right-of-way was purchased for $50.00 although no deed or evidence of transfer had been recorded. The *Roebuck* court relied upon *Potter v Safford,* 50 Mich 46 (1883), which defined the term laid out pursuant to MCLA 221.20 as follows:

> In a strict sense a road is not laid out unless the proceedings are in conformity with the law, but in a popular sense every road may be said to be laid out where proceedings have been taken by the highway authorities for the purpose, however irregular the proceedings may be, or however imperfect."

The *Roebuck* court observed that the roadway in question clearly came under the statute. In our present case James Freeman deeded two rods (33 feet) off the west side of his 80 acres on June 24, 1915 to Sherman Township. The description language specifically states "to be used for highway purposes". As observed by Alfred Villadsen, the deeded 33 foot strip would take a person to just north of the ridge area which lies between the wetland and the blueberry bog area. Therefore it would include most if not all of the wetland marsh area that lies immediately south of the Freeman Drain. In our present case the township has deeded the rights it acquired under James Freeman's deed to the Mason County Road Commission. Although the Freeman deed does not include the entire one mile in dispute, it does include a significant portion which extends somewhat less than ½ mile into the disputed one mile section. The *Roebuck* court observed that "the law does not fix the number who must travel upon a road in order to determine whether it exists by user (page 131) . . . " it would be sufficient to constitute a highway by user if the road was traveled as much as the circumstances of the

surrounding population, and their business, required." Citing *Village of Riverview v A.G. Liggett and Sons, Co.,* 253 Mich 23 (1931).

In the case *Appleton Trust v Emmet County Road Commission,* 235 Mich App 546 (1999), trial judge Pajtas held that it was a matter of common sense that a road in dispute which was 302.5 feet long and was on the center line of the border between Emmet and Charlevoix Counties, but had never been maintained or otherwise dedicated as a public highway but did appear on maps and surveys and plat maps, was a public road. Also he observed the 1930 McNitt map showed the Emmet County case road extended to the water's edge. Judge Pajtas thus held that even though an actual road had not been established and there were large trees growing in the right-of-way, that it was a matter of "common sense" that the road extended to the water's edge. The Court of Appeals reversed holding that the trial judge had utilized a new or novel "common sense" theory that was not supported by statute or case law. This Court recognizes that common sense alone would not serve as a basis in its ruling regarding Darr Road. However, there is room for the application of common sense as to the fact vehicles would attempt to use Darr Road beyond the Freeman property down to Mavis Road. As stated earlier, we have two bridges, one of which is fairly substantial over the Lincoln River plus the well-built non-railing but cement bridge over the Freeman Drain. It is logical that the use of the northern part of the disputed one mile is explained by the desire to have access to the pastureland east of Darr Road as well as the "private" dump area just north of the ridge described by Mrs. Villadsen as well as the topsoil excavation on the acreage owned by Terryn, a subsequent owner from Henry Stark.

It does not make sense that the Road Commission and/or its predecessor Sherman Township, would seek to isolate the approximate north one-half or north one-third of the 1½ miles between Fountain and Mavis Roads from the south one-half mile or even two-thirds miles down to Mavis and then continue with three miles of Darr Road from Mavis to Decker. As stated in *Roebuck, supra,* page 131 as follows: " . . . it would be sufficient to constitute a highway by user if the road was traveled as much as the circumstances of the surrounding population, and their business, required."

In our present case the pasture usage by the Villadsens and Campbell and the topsoil excavation by Terryn clearly showed an established use for decades over the northern half of the disputed one mile. However there also has been considerable testimony that the south half was also used by Mr. Saya's father for travel to the Fountain area as well as other hunting and recreational uses described above. The Court is not persuaded by Defendant's reliance upon *Maghielse v Crawford County Road Commission,* 47 Mich App 96 (1973). In that case private property owners had installed four different gates along the 4¼ miles of disputed road. Further the road consisted of rutted tracks which appeared to follow the west bank of the Au Sable River and would not have had a defined line. Similarly the Court is not persuaded by Plaintiffs' citation of *Missaukee Lakes Land Co. v Missaukee County Road Commission, supra,* in that the Plaintiffs land in Missaukee consisted of 6,500 acres which had been entirely fenced in. Evidently there were some eleven roads within that sizable portion that Defendant Road Commission sought to be declared as public highways. The Missaukee court observed that none of the eleven roads had appeared

to be township roads originally and that instead Defendant Road Commission had simply certified the mileage under the McNitt Act with minimal maintenance. The Missaukee court observed that Plaintiff Hunting Club had done much of their own road improvement and had at times excluded the public. Further, the *Missaukee* court observed that use alone of old logging roads long after lumbering operations have ceased, is insufficient to establish public highway by user. This Court also distinguishes *Thunder Mountain Heights Land Corporation v Van Buren County Road Commission,* 342 Mich 88 (1955), relied upon by Plaintiffs in that in *Thunder Mountain* the disputed 650 foot strip would have been an extension from a platted road to a lake. The strip was referred to as a trail which has the same designation on our Mason County maps regarding the disputed portion of Darr Road. However the trail in *Thunder Mountain* was not a defined line in that it followed the course of a creek which sometimes overflowed and washed out the road. The *Thunder Mountain* court held that there was no definite or established route due to the washouts and that at one time a landowner had erected a chained gate across the road. Thus there are distinguishing features which support the denial of a public road in *Thunder Mountain.* Also there is some merit from *Pulleyblank, supra,* that is analogous to our case in that in *Pulleyblank* it was recognized that Benson Road served as a destination road in order to reach Free Soil. In our present case the disputed portion of Darr Road clearly would link the Freeman parcel to the rest of Darr Road starting at Mavis going south three miles to Decker, and it provides direct access to Fountain Road which is an east/west blacktop road. According to Witnesses Saya and Archer, the area is gradually gaining in population, thus more and more people seek to use connecting roads.

4. Open and Notorious:

Alfred Villadsen testified that he had never told anyone that they could not use Darr Road. Similarly, Mrs. Villadsen also had never told anyone they could not use Darr Road. Further, Darr Road has never been gated nor chained. Mrs. Villadsen testified that the dump area immediately north of the ridge was a private dump in that only nearby landowners would use it. Nevertheless, there was no indication that the nearby landowners asked permission to use Darr Road itself. Further, although the use of a "hard dump" where one would not find rotting or smelling type material was rather openly allowed in earlier times, such friendly usage of Darr Road to reach the dump was evidently done without question by the neighbors. *See Kalkaska Road Commissioners v Nolan,* 249 Mich App 399 (2004 page 403 wherein the *Kalkaska* court observed that open, notorious, and exclusive public use can be found where persons use the road without ever requesting permission to do so and because they understood it was a county road. Further, the *Kalkaska* court cited *Roebuck v Mecosfa, supra,* in that such usage does not require a showing of a fixed number of persons but instead would be measured by the circumstances of the surrounding population and their business and that use of a road for hunting and recreational purposes satisfied the public use requirement. Our present case is replete with examples of hunter usage, horseback riding, snowmobile riding, cross-country skiers, four-wheel drive vehicle usage, and bog runner usage. The Court is very sympathetic to Mr. Villadsen's desire to protect the natural area he owns and which is enhanced by the wetland easement he has acquired. Nevertheless based on the factors observed above, public usage has been open and notorious and although not high numerically, said farming and

recreational usage has been shown to have lasted from the 1930's until the present. At times the bog runners have limited usage and at times the bog itself allowed for only a foot path and/or horse travel, nevertheless there has always been a defined line that crossed the bog and thus continuous open and notorious usage has occurred.

The Court determines Darr Road is a public road by user.

Date: October 21, 2003 /s/ Richard I Cooper
Richard I Cooper,
Circuit Judge

STATE OF MICHIGAN

51ST JUDICIAL CIRCUIT COURT, MASON COUNTY

ALFRED VILLADSEN, DONALD
AND MARILYN VILLADSEN,
AND JACK MICKEVICH,

Plaintiffs,

v. File No. 02-348-CH

MASON COUNTY ROAD
COMMISSION, SHERMAN
TOWNSHIP,

Defendants. /

BENCH TRIAL – VOLUME I

BEFORE HONORABLE RICHARD I. COOPER, CIRCUIT JUDGE

Ludington, Michigan – Wednesday, August 20, 2003

* * *

[205] A. Yes, sir.

Q. And did they have to stop at the mudhole?

A. No, sir.

Q. They did stop at the mudhole, didn't they?

A. No, they went through it.

Q. Did they run their blade going through it?

A. We had a crew out there doing some work. They were doing some trimming. And they did use the dozer to do some, fill some ruts and do some minor draining, yes.

Q. And a few years earlier a blade went through the first quarter mile from Mavis Road, didn't they?

A. Well, a blade continually well, does on regular intervals, does maintenance work on that road, yes.

Q. Well, I'm talking I meant the first quarter mile of Darr Road off of Mavis Road?

A. They have done work in there, yes.

Q. Okay. Work was done about, work was done on that first quarter mile about five years ago?

A. Could very well be.

Q. Okay. Other than, assuming that what I said is true that a blade went through a quarter mile five years ago and you, and you went, and this bulldozer went through just before the litigation started, can you tell this Judge any other instances since 1935 where the Mason County Road Commission has done any, any work or servicing of this [206] section of Darr Road that is subject to this litigation?

A. Yes, sir.

Q. And what is that?

A. In about 1999, 2000, thereabouts, there was a tree blew down just south of the Freeman drain that the crews went in and cut, cut the tree up on that.

Q. Wasn't the tree already cut up and removed and just a little top branches left when they got there?

A. When I got there, no. I was called by Central Dispatch to review the site. And we did have, we went out

and investigated, and then had some people come in and do some trimming on it, yes.

Q. Oh, were you there when they did the trimming?

A. I detailed the crews in there to do it, yes.

Q. Would it surprise you to know that the trimming was already done when they got there?

A. Some of it was.

Q. Okay. And so when the actual crews got there, what they did is they removed some brush from the area that was left over from the cutting of the, from the, from the clearing cutting the tree by Mr. Villadsen?

A. Could very well be.

Q. All right. Well, then so there may have been an instance in 1999 or 2000 when they went there. Other than that can you tell us any other, any other example or any example of [207] any work which was done, which was done by the Mason County Road Commission?

A. I cannot, no. Because I do not always schedule the maintenance work that's done.

Q. Okay. But it is true that for all of the receipts and documentation that you provided in the direct testimony, you can't directly tie any of that to the one mile, to the one mile in question?

A. No.

Q. That's not true or you can't?

A. I can't, no.

Q. Okay. Let's talk about the, about the McNitt action, if you will. There were, there were roads were actually going to be turned over to the commission 20 percent a year for five years, right?

A. That's my understanding, yes, sir.

Q. And you investigated those records, didn't you?

A. Yes, sir.

Q. And you were able to find that for four of the years that the Road Commission had done the requisite publication in the local newspaper, right?

A. I didn't do the – I can't answer that because I didn't do the investigation myself, no.

Q. Okay. Well, you had people do the investigation for you?

A. Yes, sir.

* * *

[214] Q. Okay. Well, now this, the Sherman Township supervisor, I was there when – didn't he tell you that you owed them some construction because of money that the Road Commission had been getting for roads that weren't being serviced?

A. I don't remember that conversation.

MR. ELSENHEIMER: Objection as to relevance. I'm not sure where we're going on this.

MR. ANDERSON: All right. But I'll withdraw that. I'll withdraw that question.

Q. If you're going to blade the, have a blade go all the way from Darr Road to Fountain Road, and if you're going to put three inches of gravel and other material at the base of it, that would be a major project, wouldn't it?

A. Depending on the size of the or the length of the work that was being done. In a lot of cases we'll do some, do improvements for spot improvements, and we do them as maintenance work for filling blowholes and that type of thing, washouts and so forth.

Q. Well, this isn't a blowhole or wash out, is it, this bog?

A. No.

Q. It's something more significant than that, isn't it?

A. Yes.

Q. Okay. The official map of Mason County refers to this section of Darr Road, if I go in a quarter mile from Mavis [215] and a quarter mile in from Fountain, then that's referred to as a trail on the official map of Mason County, isn't it?

A. Yes, sir.

Q. I don't understand what the difference between a trail and an improved road is?

A. Just level of service.

Q. Okay. Is there any service to a trail?

A. Some.

Q. Are you aware of any local residents that require Darr Road between Mavis and Fountain Road to be open for any personal or business travel?

A. I'm not aware of anybody needing it. But then I'm not aware of anybody needing U.S. 31 for travel either.

Q. How many vehicles a day travel Darr Road between Mavis and Fountain Road?

A. I have no idea.

Q. Well, yesterday it was none, wasn't it?

A. Well, actually it was. There was at least one.

Q. That got through?

A. Somebody had to get there to pull him out.

Q. Oh, in the six-wheel drive vehicle?

A. It's a vehicle.

MR. ANDERSON: Your Honor, it's after five o'clock. I'm very close to being done and I may be done.

* * *

STATE OF MICHIGAN

51ST JUDICIAL CIRCUIT COURT, MASON COUNTY

ALFRED VILLADSEN, DONALD
AND MARILYN VILLADSEN,
AND JACK MICKEVICH,

Plaintiffs,

v. File No. 02-348-CH

MASON COUNTY ROAD
COMMISSION, SHERMAN
TOWNSHIP,

Defendants. /

BENCH TRIAL – VOLUME II

BEFORE HONORABLE RICHARD I. COOPER, CIRCUIT JUDGE

Ludington, Michigan – Thursday, August 21, 2003

* * *

[285] If anything has been there since then, it's been something has been added since Al had owned it. Before that when I went back there for Bill Marson, there was little indication, if any, of going to Darr Road on that portion of the property.

Q. In the last 20 years, sir, what need has the general public had for this Darr Road between Fountain Road and Mavis Road?

MR. ELSENHEIMER: Object as to foundation. There's no testimony that this witness is able to identify the need.

MR. ANDERSON: Thank you. I'll withdraw the question.

MR. ELSENHEIMER: All right.

MR. ANDERSON:

Q. You're the township supervisor, aren't you?

A. Yes, I am.

Q. And you're familiar with the roads in the township, aren't you?

A. Yes, I am.

Q. And you're familiar with what your, what residents of your township need in terms of roads and transportation?

A. That's correct.

Q. That's part of your job, isn't it?

A. Yes, it is.

[286] Q. All right. So for Darr Road between Mavis Road and Fountain Road, in the last 20 years what needs have the residents or businesses of the community had for Darr Road?

A. Well, I asked myself that same question. And we held a public hearing for the township, for the people of Sherman Township and with everybody involved. Mr. Villadsen was there and I believe you was there. And we had a public hearing to determine the need of that road to stay open because it was petitioned to close. My personal view was to close the road. That was my personal view. But I am only one member of a township board. And the

input that we got from the public at that meeting which you attended, I believe, if I'm not mistaken, they were opposed to closing of the road. Now, the reason for their opposition, I couldn't tell you. But the vote was that we keep the vote – the road open. I'm an elected official. I don't do what I want to do. I must do what the taxpayer and the people that vote and elected me, not for – my personal feeling was to close the road.

Q. My question of you, though, sir, was what need do you observe in your capacity as township supervisor for the public's use, public and businesses' use of Darr Road between Mavis and Fountain Road, what need is there for the last 20 years?

[287] A. There's only need, I don't know if you'd call it a need, I would say the use that I heard of and seen, horse tracks, people rode their horses on that road. They tell me the hikers went there, I didn't see 'em, for a hiking trail. As far as a need as a township supervisor, I think we can't look at today. We got to look at tomorrow and maybe 40 years from now. And the public said that, "You don't close roads because it's too hard to open them 20, 30, 40 years from now when there is a need and the expense would be at a point that the landowners will not be able to provide, whoever owns it at that time, open that road up to County specifications", which is a blacktop road as I understand it.

Q. All right. And so there might be a need for a road there in 20, 30 years?

A. Very possible.

Q. But in your opinion and based on your experience as the township supervisor, there's not a need for the road there today?

MR. ELSENHEIMER: I object to the form of the question. That does not correspond with the testimony that we've just heard over the last five minutes.

MR. ANDERSON: Well, I just asked a new question and could the, and I'm just asking what his answer might be. I'd ask the reporter to read back the last question.

* * *

[392] especially like it in the spring and in the fall. In the spring because the bugs aren't out, and there's frogs croaking, and it's just a neat time to be out there. And in the fall when the leaves are in color and before the hunters kind of take over the woods.

Q. And which, would you use Darr Road in those travels on horseback?

A. Yes.

Q. And what route would you typically take?

A. I would come down Mavis Road, turn on to Darr, and take Darr on down, quite often check out the Lincoln River Bridge.

Q. Does the horse have any trouble getting through the bog area?

A. No.

Q. Even in the spring months when it's wet?

A. No.

Q. Are you the only person that you know of that has utilized that property for horseback riding?

A. No. There's other people.

Q. And do you know whether those other people are people that live in the adjacent to Darr Road or people that live elsewhere within the County?

A. They live on U.S. 31 near the Lincoln River, which would be like a mile directly west, northwest.

[393] Q. And how often have these people used the roadway?

MR. ANDERSON: Could we have a foundation if he's seen them, I mean just some foundation, Your Honor.

I object for lack of foundation.

MR. ELSENHEIMER:

Q. You have indicated to us that, pardon me, Your Honor, you have indicated to us that you're aware that other people have used the road, and you identified those people as living on U.S. 31; who are these people, if you know?

A. I can't call them by name. But they would stop at my house on their way by and ask if I wanted to go with them. And they'd tell me that is where they're headed.

Q. Did they ever ask for permission?

A. No.

Q. Now, how often would you see this occur?

A. A couple times a year maybe.

Q. And where did they tell you they were going?

A. They said they were going to take Darr Road.

MR. ANDERSON: I really object to the requested hearsay on the part of the witness.

MR. ELSENHEIMER: I thought I was laying a foundation but I can ask the question in another way.

Q. Sir, you have indicated that these people would stop at the farm while you were there and ask if you wanted to go with them?

* * *

[464] clear up to the bog as recently as last summer.

Q. Okay. Why couldn't you get through the bog?

A. At the time they were doing some construction.

Q. Who are they?

A. The Road Commission.

Q. Okay?

A. And I elected not to go. I walked.

Q. Okay?

A. I have walked the roadway a number of times.

Q. Are four-wheelers and quads legal on County roads?

A. Not to my knowledge.

Q. They're not legal?

A. Not to my knowledge.

Q. Okay. Have you ever attempted to operate your automobile through the bog?

A. No, no reason to.

Q. Now, you're familiar with the Road Commission's abandoning roads and criteria they use?

A. Yes, I am.

Q. Okay. Is Darr Road in your opinion from Fountain Road to Mavis Road needed for the business of the people in the area?

A. At this present time, possibly not. At the past years ago, the testimony in this case has indicated that it was used and it was needed. And in the future certainly it [465] will be needed.

Q. Okay. You mean when you say in the past it was needed, you're talking about the testimony of getting the calves, getting the calves, examining calves in the field?

A. Also moving farm machinery, recreational usage.

Q. Other than, and so at the present time you don't know how it's needed for the business of the people in the area?

A. I am no longer on the Road Commission. And I don't know what the current needs are. I understand from the testimony that there is some recent work been done, but I'm not knowledgeable of. It's been approximately a year since I was on that, on that right of way.

Q. You were there after, after the blade came through after the –

A. That's right.

Q. Okay.

A. That all occurred in a matter of one day.

Q. Okay.

A. It wasn't a large amount of work timewise.

Q. Is the road from Mavis Road to Fountain Road needed for the convenience of the people who live in the area?

A. I would say recreationally, yes.

Q. Anything else, any other, anything other than recreation?

A. There are no homeowners that live on the property other than the Plaintiff.

[466] Q. And in a normal, would it be fair so say that a normal automobile would have difficulty traversing the road from Mavis Road to Fountain Road through the bog?

A. A normal vehicle as I understand it today would have difficulty in the bog area. I think I have used that term cranberry bog in contra, a little different than what you, somebody else had called a blueberry bog or just a bog in general. Now, a cranberry bog is very, very wet. And that's a misnomer on my part. But at the point I have in the past I referred to that as a bog area, that goes back oh, a number of years.

Q. Okay. Well, and I wish I could remember the terms the Judge used but I think he called it a blueberry bog?

THE COURT: No, no. I had heard somebody call it that.

MR. ANDERSON: I didn't mean –

A. I think Mr. Campbell did.

MR. ANDERSON:

Q. But the bog that you referred to, would that be what probably used to be a lake or wet area?

A. There's only one bog in question here. And it's a matter of 150 to 200 feet long.

Q. Okay.

A. I don't know, I'm not aware of any bog that is north or just south of the Freeman bridge. That was a rather high

* * *

[468] Q. Do you recall meeting Mr. Villadsen on the what's called Darr Road?

A. I believe, I believe it was in the wintertime. I think I was a foot. I had walked. I had driven my car, my automobile, probably down to the oh, to the area of the terminus of Millerton Road, where Millerton would have adjoined Darr Road, which was probably three quarters of a mile in.

Q. Okay?

A. And I walked at that point to the north. And at that point I met Mr. Villadsen, I believe in a pickup truck with another gentleman with him.

Q. Did you tell Mr. Villadsen that you get $1,500. a year for that mile and in over 20 years that is $30,000. and you wouldn't give that up for him?

A. I don't recall having said that, no.

Q. Okay?

A. I'm sure that that is common knowledge, that everybody has known and talked about repeatedly, that the local road contribution and emptio [sic] funds is basically in the name of, in the range of 1,500 to $1,600. a year per mile.

Q. Do you remember talking to the press about the petition for abandonment and being quoted in the newspaper?

A. Press?

Q. The newspaper?

* * *

STATE OF MICHIGAN

51ST JUDICIAL CIRCUIT COURT, MASON COUNTY

ALFRED VILLADSEN,
DONALD AND MARILYN
VILLADSEN, AND
JACK MICKEVICH,

Plaintiffs,

File No. 02-348-CH

v.

MASON COUNTY ROAD
COMMISSION, SHERMAN
TOWNSHIP,

Defendants.
_____/

BENCH TRIAL – VOLUME III

BEFORE HONORABLE
RICHARD I. COOPER, CIRCUIT JUDGE

Ludington, Michigan – Friday, August 22, 2003

[497] Q. Okay. That you and the Terryns used?

A. That people, well, they took them too and like Starks and some of the close neighbors. That was about all of us then.

Q. Okay.

A. And that was right there at the bottom of the hill right close to his property.

Q. Okay. Other than the neighbors who had property there or people you gave permission to go on to, to go there for, did you ever see any member of the general public use Darr Road from Fountain Road to Mavis Road?

A. No, not until the snowmobiles came.

Q. Okay. Do you remember whether or not Mr. Terryn did anything to the trail in order to get back to the, to take the topsoil?

A. Well, the first wethole past the Freeman drain, he had to work that with his bulldozer enough so that he could get through with his trucks in the dry part of the summer. Otherwise you couldn't get through there.

Q. Now, from 1931 to 1977, were you familiar with the people that lived around you in your community?

A. Sure.

Q. And you were familiar with the people that lived near you on Fountain Road?

A. Yes.

* * *

[499] particular road in Mason County.

MR. ANDERSON: I'm just asking her about the custom and usage of her local community.

THE COURT: All right. If you're asking about usage and that's based on personal observations, that is permissible. Go ahead and restate the question so I can hear how it's framed.

MR. ANDERSON:

Q. Did you or are you familiar with anyone that from 1931 to 1977 that considered Darr Road a road from Mavis to Fountain Road?

A. No.

Q. Was there a sign, was there a sign just off Fountain Road on Darr Road?

A. It's a dead-end road.

Q. And where did the road dead end?

A. At our driveway, I presume. I don't know, you know, where else they would go. There wasn't a road.

Q. Okay. Did you ever, beyond your driveway, did anyone ever do anything other than Mr. Terryn to improve the, to improve Darr Trail to the Freeman bridge?

A. Not to my knowledge, no.

Q. How often did you see cross-country skiers?

A. Only a couple times that I can remember. It was one woman that liked to cross-country ski and she did. But it was

* * *

[505] Q. Okay. That whole dark area?

A. Yes.

Q. Okay. Would you show the Judge on this map the route that you took in your horse and buggy to get around the blueberry marsh?

A. Well, we would come up here and come up on this trail. Whoop, sorry. I don't know just exactly, you know, where it was when we'd get over here because it wasn't, you know, we just had trails. I don't think it shows on here back that many years ago.

THE COURT: So you're saying this is a trail through here?

A. Um-hum, just a two-track that we have used.

THE COURT: Okay.

A. This is a ridge that runs.

THE COURT: Okay.

MR. ANDERSON:

Q. Would you have to take the trail to get around the blueberry marsh?

A. Oh, yes.

Q. And what was the problem with the blueberry marsh?

A. Well, it was wet and soggy, you know. The road was spongy. We just didn't use it.

Q. Okay. Do you know if anyone else used the road there from 1931 to 1977?

[506] A. Not that I can ever recall. I mean and we lived right there. I was outside most of the time. You certainly would have seen anybody that if anybody had used it.

THE COURT: The other question I have got is Campbell talked about a lane, and she talked about using something to get to where the cattle would normally be at the end of the –

A. Right here from our farm. This is our milk, our cow barn. And we had a lane that went right, you can tell kind of where that was, and it went right here to the ditch. And we had a tube in the ditch. And then we went, there

was a lane all the way down here, right to here. And then this was pasture.

THE COURT: Okay.

A. And when like I say when I was a child, our cattle pastured all over here. We went clear back in here, you know, to get them.

MR. ANDERSON:

Q. Okay. Mrs. Villadsen, was there another lane that was just where the, where the Freeman drain bends there, was there another lane that came up this way?

A. Well, we used to go around this because you can get around this blue part right here.

Q. Why would you go right around that blue part?

A. Because this was too wet, you know. That's the first

* * *

[509] all I have seen.

Q. Anyone ever cross, when you say the bridge, what bridge are you talking about?

A. Freeman drain.

Q. Did they, did they stop and turn around there?

A. Most of them back up because there isn't anyplace to turn around.

Q. Do you ever remember any going beyond there?

A. Well, they'd go down to the corner there where the ditch turns and turn around.

Q. Okay. Did you ever see any Mason Road, Mason County Road Commission employee ever service Darr Road in any way beyond your driveway and I mean towards Mavis Road?

A. No, I haven't.

Q. Okay. Did you ever see any signs that that had been done?

A. Well, they put road closed signs down by the ditch. And by, put weight limit signs on the Lincoln River Bridge.

Q. Okay.

A. But that's all I have ever seen.

Q. Other than designating the road closed?

A. Right.

Q. There hasn't been any participation or maintenance or anything like that?

A. No, sir.

Q. Would strangers come and use that dump?

* * *

[644] be maintained.

Speaking specifically, sir, about the legal theories which we are using to defend; first, we are not coming to this Court, and I think we've made this very clear, we're not coming to this Court saying that we have a valid McNitt Resolution. The Court has heard our statements to that regard. We can't find one. We can't find one. Wish we could. Can't find it.

All we know is that something certainly appears showing that this road was reported with the state as having been accepted into the County road system pursuant to the McNitt Act in 1935. And there's obviously a map on record which is part of this, the exhibits in this case, which will show the Court that.

Do we say that that is enough for a McNitt Resolution or for a McNitt acceptance? Judge, we're not going to waste your time with that. It's not enough. In and of itself, it's not enough.

Is it of no value, however, in terms of this case in general? Well, no, it does have value. It certainly does. Because it goes to show that certainly in Lansing and certainly in Mason County there was some indication that this particular property was indeed to be acquired. That dominion was indeed to be placed over this particular stretch of roadway. So there is some value to [645] that document.

Is the value in terms of a formal acceptance or a formal dedication? Judge, we're not here arguing that. So all of the argument from the closing argument relating to formal dedication, it's just not before you today.

As we said in our brief, the issue regarding dedication and acceptance that is in front of you, however, is informal dedication and informal acceptance, a different set of concepts. And yes, we are relying upon the Freeman deed to say that 33 feet of, about a mile stretch of that road, two 40's of that road was, in fact, dedicated by Mr. Freeman to the public. He gave a Quit Claim Deed in 1915.

And you heard the discussion from Mrs. Villadsen saying that he recognized that he had done so. He gave a

Quit Claim Deed to the public for that property for highway purposes.

Judge, I don't know how much more clear you have to be. He did it. It's done. It's recorded. It's part of the history of this County. That is a clear absolute crystalline dedication of property. Is it the entire 66 feet that the County Board of Commissioners believes exists? No, it's not.

Can we explain why it isn't the entire 66 feet? We can not. There is no evidence, there is no one from

* * *

Order

Michigan Supreme Court
Lansing, Michigan

October 31, 2006

Clifford W. Taylor,
Chief Justice

129672(51)

Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman,
Justices

ALFRED VILLADSEN,
DONALD VILLADSEN,
MARILYN VILLADSEN, and
JACK MICKEVICH,
Plaintiffs/Third-Party
Defendants-Appellants,

v.

SC: 129672
COA: 255955
Mason CC:
02-000348-CH

MASON COUNTY ROAD COMMISSION,
Defendant/Third-Party
Plaintiff-Appellee,

and

SHERMAN TOWNSHIP,
Defendant/Third-Party
Plaintiff,

and

DEPARTMENT OF NATURAL
RESOURCES and MASON COUNTY
DRAIN COMMISSIONER,
Third-Party Defendants.

/

On order of the Court, the motion for reconsideration of this Court's May 19, 2006 order is considered, and it is

DENIED, because it does not appear that the order was entered erroneously.

CAVANAGH, J., would grant reconsideration.

KELLY, J., would grant reconsideration and, on reconsideration, would grant leave to appeal.

[SEAL] I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

October 31, 2006 /s/ Corbin R. Davis
Clerk

PUBLIC HIGHWAYS AND PRIVATE ROADS (EXCERPT) Act 283 of 1909

221.20 Public highway; definition, width.

All highways regularly established in pursuance of existing laws, all roads that shall have been used as such for 10 years or more, whether any record or other proof exists that they were ever established as highways or not, and all roads which have been or which may hereafter be laid out and not recorded, and which shall have been used 8 years or more, shall be deemed public highways, subject to be altered or discontinued according to the provisions of this act. All highways that are or that may become such by time and use, shall be 4 rods in width, and where they are situated on section or quarter section lines, such lines shall be the center of such roads, and the land belonging to such roads shall be 2 rods in width on each side of such lines.

STATE OF MICHIGAN

51ST JUDICIAL CIRCUIT COURT, MASON COUNTY

ALFRED VILLADSEN,
DONALD AND MARILYN
VILLADSEN, AND
JACK MICKEVICH,

Plaintiffs,

File No. 02-348-CH

v.

MASON COUNTY ROAD
COMMISSION, SHERMAN
TOWNSHIP,

Defendants.
_____/

MOTION RE: WIDTH OF DARR ROAD

BEFORE HONORABLE
RICHARD I. COOPER, CIRCUIT JUDGE

Ludington, Michigan – Monday, April 5, 2004

* * *

[5] that used it were the people that owned it.

And, you know, I hope the Court found during the trial that I tried not to waste a lot of the Court's time and to take and to get the job done and to go forward. But if were going to proceed today, I would very much appreciate it if the Court could tell me what the ten-year period was when the road became a highway by user. I mean that is what the Statute requires in the cases.

And that is what you found. But you just didn't find as a factual matter when the ten years was. So that's my question. If you could, if you could help me with the

answer, then the hearing today could be a lot, a lot more straight forward.

MR. ELSENHEIMER: Judge, may I comment on the preliminary issue?

THE COURT: Sure.

MR. ELSENHEIMER: Let me just start by saying that I agree and disagree in part with the statements of Mr. Anderson.

I do agree that the requirement is a ten-year requirement in order to satisfy the Statute relating to highway by user. And that the Court's opinion detailed all of the use and all of the work starting with 1905 and proceeding to about 2001. And I think it did a very good job laying out those issues in a timeline.

[6] But I do agree that there was no statement in your opinion as to which ten-year period or which groupings of years combined created the highway by user. I think the approach the Court took, if I may surmise from the reading, is that there is evidence where near a hundred year period showing use by the public and showing work by different parties, the Drain Commissioner, the township, the Road Commission, the township involved in this particular property. And that the Court determined because of that that the highway by user Statute had been met.

I do think it's appropriate for proofs today that there be some indication by the Court and maybe you're not able to give this to us right now without some research on your own or reviewing the record, but that there be some indication as to what period of time, in fact, the Court did find that the highway by user was effective.

The reason that is important, Judge, and this is where I disagree with Mr. Anderson, the reason this is important is because the highway by user Statute says that you must within that ten-year period of time, if you're a property owner who seeks to avoid the imposition of this presumption of the 66 foot right-of-way, you must take some action to contravene that.

[7] You must either put the public on notice in terms of a fence, as Mr. Anderson said. I don't believe farming would be sufficient, but a fence of some kind or a structure. You must put the public on notice that you do not intend to allow the entire 66 foot width to be used. Or you must begin to institute a proceeding in Court to stop the highway by user from taking place.

Now, there is evidence as I understand will be presented today about some uses, which we agree and I think agreed to last time we met, might result in a diminution of the width of the highway, that being in particular a fence, a very old fence that was in place on a portion of the property.

And as I indicated before, we believe that fence line, the old fence line probably will be something that would create a presumption or rebut the presumption of the entire width being used for public purposes.

But in order for us to be able to defend on that issue, or any issue relating to the use within that ten-year period of time called for by the *Kentwood* case, we also need to know when it is that the Court believes the ten-year period of user actually was completed. So in that sense I agree with Mr. Anderson.

MR. ANDERSON: And I assumed, you know, but a lawyer shouldn't make assumptions, but I assumed that the [8] period would have started when there was an alleged grant of a portion of the road, which I believe was in 1925. Certainly couldn't have been much before that when there was a ditch, you know, when there was no bridge over the ditch.

But there has to be some time period. And I just, I simply need to know when it is. Because the state doesn't just keep taking, taking, taking to get to 66 feet, you know, a hundred years down the road but the rights are established during the ten-year period. And I don't mind if the Court takes a few minutes but I mean it is kind of a critical issue.

MR. ELSENHEIMER: I agree it's a critical issue. And, frankly, I want the Court to take as much time as it needs in order to put its thoughts together on that issue because once you determine what that period of time is, it's obviously going to control how Mr. Anderson and I go forward with regard to the current width.

THE COURT: All right. What I expected would have happened is that in today's hearing if there is any argument that the property owner had used the land in such a way that the normal 66 feet would not apply, that Plaintiff would provide what portions of the road he feels that arguments applies to. And the Court would determine whether that particular usage did or didn't rebut the * * * [18] a degree neighbors who were in that area would discard and I think Mrs. Villadsen called it something like dry items. It wasn't used for rotting type stuff but maybe abandoned furniture, something of that nature.

And in the opinion towards the very end I point out that based upon the testimony that there had been horses and there had been cars, and even Mr. Villadsen had said to his family when he'd see a car go by, "Won't be long and they'll be calling for us to help pull them back out". That there was an on-going usage for sure just on the testimony from witnesses here in trial from the 1930's until the present.

So again I don't really see that I have to take a particular ten years when the Statute itself simply says ten years or more. And I don't find anything such as a gate that would have interrupted any of those ten-year periods. There was nothing like a fence that was put across to interrupt any of those, so to speak, ten-year periods.

So it was in the Court's mind and I'm still comfortable with that that we have an on-going use that started in 1905 and it was never, it was never interrupted, and I'm repeating, by fences or a gate or even somebody digging a ditch across the road, etc.

So I do decline the request to say, "Well, what [19] ten years were you talking about, Judge?" This is a span that started in 1905 and has continued to the present. And the defined line by the aerials alone, and again going back to the 19, I think I said it was a 1938 aerial, right, again that wasn't when the road was somehow newly dug or something. That was just a standard general aerial. And the road was already there in 1938.

And I, if somebody said, "Well, Judge, there was a fence there", I indicated at our last hearing that if the fence was there and then allowed to deteriorate, then the fence has been abandoned.

And I think the farming use, whether it was – I believe the removal of topsoil was to the east of Darr Road. And then topsoil was hauled out using Darr Road. But I don't think there was any testimony that topsoil was removed and within what would be considered the 66 foot right-of-way of Darr Road.

So any testimony today on farming would be of interest to me. But I, I'm still just trying to retrieve now as I'm sitting here any other, any other testimony that would shed light on some of these comments I'm now making.

To sum it up, if somehow there's a claim that there was something that cut off the 66 foot right-of-way, that still is Plaintiffs' job to say what he thinks would

* * *